In The

Supreme Court of the United States

October Term, 1979

No. 79-280

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

vs.

HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,
Nominal Respondent,

KYRIAKI CLEO KYRIAZI, individually and on behalf of all those similarly situated,
Respondent.

~~MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND~~
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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~~PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY AND~~ PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari be issued under 28 U.S.C. §1254(1) to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this cause on

April 25, 1979, which denied a petition for writ of mandamus and prohibition (1) directing the Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, to issue his opinion and order with respect to relief to be accorded the individual plaintiff and plaintiff class in accordance with his order of bifurcation filed October 14, 1975, (2) prohibiting him from proceeding with the second phase of this action as described in the aforementioned order until he has decided the first phase of the action under that order, and (3) directing him to vacate his order of February 27, 1979, requiring the payment of attorneys' fees to plaintiff's attorney and to require him to enter an order directing that said payments be returned to petitioner or, in the alternative, deposited with the clerk of the district court.

Petitioner also prays that a writ of certiorari be issued under 28 U.S.C. §1651(a) to review directly the question whether the District Judge should be directed to act, and be prohibited from acting, in accordance with the foregoing.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for writ of mandamus and prohibition is unreported. A copy of that order, along with a copy of the order of the Court of Appeals denying rehearing en banc of that petition,[1] is reprinted in Appendix A hereto. The opinion of the United States District Court for the District of

1. Chief Judge Seitz, the one eligible judge who did not sit on the original two judge panel, voted to grant rehearing "were it legally possible." Six of the remaining eight active judges disqualified themselves. Thus, the petition for rehearing en banc was determined only by the same two judges who sat on the original panel. Consequently, the procedural availability to petitioner of a hearing en banc was very severely diminished.

New Jersey, issued on October 30, 1978 (and amended on November 22, 1978) at the conclusion of the first stage of trial in this case is reported at 461 F. Supp. 894 (D.N.J. 1978). That opinion and the district court's accompanying judgment and order, dated October 30, 1978, are reprinted in Appendix B hereto. The district court's opinion, issued on February 21, 1979 in contemplation of the commencement of the second stage of trial in this case, is reported at 465 F. Supp. 1141 (D.N.J. 1979). That opinion and the District Judge's accompanying orders dated February 21, 1979, March 2, 1979, and March 6, 1979, are reprinted in Appendix C hereto. The district court's order of bifurcation, dated October 14, 1975, as well as additional unreported orders of the district court in this case pertinent to this petition are reprinted in Appendix D hereto.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for writ of mandamus and prohibition was issued on April 25, 1979 (App. A, p. 1a). A timely petition for rehearing was denied on May 18, 1979 (App. A, p. 3a). Accordingly, this Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254(1) in this case. Petitioner sought review of the issues raised in this petition in its petition for writ of mandamus and prohibition in the United States Court of Appeals for the Third Circuit. That petition was denied on April 25, 1979. The relief sought by the present petition for writ of certiorari in this Court is therefore not available in any other court. Accordingly, this Court has jurisdiction to issue a writ of certiorari to the United States District Court for the District of New Jersey under 28 U.S.C. §1651(a) in this case to review those issues.

QUESTIONS PRESENTED

1. Can the judicial system tolerate, consistent with due process of law as guaranteed by the Fifth Amendment to the United States Constitution, a posture whereby a defendant is compelled exclusively to bear the judicial cost of proceedings before special masters, including the fees of those masters, where there has been no final or otherwise appealable order as to the underlying rulings which gave rise to the occasion for such proceedings?

2. Whether a belated and *ex post facto* abrogation of the bifurcation order which petitioner relied upon to its ultimate prejudice is arbitrary and capricious or is otherwise in violation of the due process clause of the Fifth Amendment to the United States Constitution?

3. Whether a District Judge has the power to award interim attorneys' fees and costs to plaintiff's counsel where plaintiff is not a "prevailing party" within the meaning of 42 U.S.C. §2000e-5(k)?

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to this petition, 28 U.S.C. §1651(a), 42 U.S.C. §2000e-2(a)(1), 42 U.S.C. §2000e-5(g), and 42 U.S.C. §2000e-5(k), are reprinted in Appendix E hereto.

STATEMENT OF THE CASE

A. Introduction

Petitioner had previously sought in the Court of Appeals for the Third Circuit a writ of mandamus and prohibition to address the violations of due process of law guaranteed by the Fifth Amendment to the United States Constitution which have occurred and will continue to occur because (1) it is compelled

to pay the extraordinary and non-recoverable costs of Stage II (approximately 2,000[2] individual trials) of this litigation; (2) it has been prejudiced by the District Judge's *ex post facto* abrogation of his own bifurcation order; and (3) it was required to pay plaintiff's counsel $280,834.49 in interim attorneys' fees for Stage I.

The enormous costs[3] of the Stage II proceedings have been imposed upon petitioner despite the fact that no final or

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2. The members of the class number approximately 10,000. Of these, approximately 2,000 have filed claims. The time by which the approximately 3,500 rejected job applicant members of the class may file claims has not expired. Thus, the number of actual trials may be well in excess of 2,000. It is estimated that these claims will take several years to try, and that petitioner's payments to the special masters alone at Stage II could exceed three million dollars. All of this effort may be in vain should the underlying rulings upon which the trials are based be legally or factually in error.

3. In a series of rulings the District Judge has imposed upon petitioner many extraordinary, non-recoverable costs. These costs include the following expenditures: (a) quarterly payments to the four special masters appointed to hear Stage II cases at rates at and in excess of $100 per hour (more than $79,000 has already been requested); (b) payment to plaintiff's attorney of attorneys' fees and costs for the trial of Stage I (more than $280,000 already paid; plaintiff's counsel's claim for an additional $700, 000 in Stage I fees and costs remains pending); (c) quarterly payments to plaintiff's attorney for attorneys' fees and costs incurred during Stage II (see order dated March 6, 1979, App. C, p. 206a), which is presently stayed until further order of the District Judge; see order dated March 9, 1979 (App. D, p. 213a); (d) the additional payment for a paralegal to be utilized by each special master if he so desires, April 26, 1979 status conference; (e) the cost of providing all Stage II deposition and hearing transcripts to the special masters; (f) the payment of regular salaries to petitioner's current employees who appear in Stage II trials advancing their own claims against petitioner, and their witnesses who are current employees of petitioner, *Kyriazi v. Western Electric Co. et al.*, 469 F. Supp. 672 (D.N.J. 1979); (g) the enormous cost of placing petitioner's basic personnel records, approximately 30,000 of them, on computer as an "attendant" cost to the special masters' proceedings. May 2, 1979 status conference. This project, to be financed *solely* by petitioner, is to be completed within the next five months using its own personnel, 180 persons provided by outside contractors, with all keypunching to be done by an additional outside contractor force.

otherwise appealable order has been entered as to the underlying rulings which gave rise to the occasion for Stage II. Petitioner submits that, in the context presented, requiring petitioner (a) to bear exclusively the judicial cost of proceedings before special masters and (b) to finance its adversary's litigation against itself by means of an award of interim attorneys' fees is a taking of its property without due process of law. Additionally, the award of interim attorneys' fees was an excess of judicial power in that plaintiff was not a "prevailing party" within the meaning of 42 U.S.C. §2000e-5(k).

Petitioner also submits that its due process rights were violated by the District Judge when he, after trial, abrogated his own bifurcation order entered before trial. The effect of that abrogation was an *ex post facto* denial to petitioner of its right to make a reasoned and informed judgment as to how to defend itself at Stage I. Furthermore, the abrogation of the bifurcation order had the effect of blocking the appeal contemplated at the conclusion of Stage I because the District Judge withheld the awarding of injunctive relief. In this regard, petitioner submits that the posture of paying for the costs of 2,000 trials despite the absence of a final or otherwise appealable order as to the underlying rulings upon which those trials are based does not comport with the notion of fundamental fairness inherent in the concept of due process of law.[4] This is so because petitioner's right to appeal is conditioned upon its willingness to expend millions of dollars in extraordinary non-recoverable costs over a period of several years.

The due process deficiency in the present posture is directly attributable to the inordinate weight given a liability finding of a

4. Nor does this posture comport with the overwhelming view of other courts who regard the grant of injunctive relief as being mandatory upon a finding of liability. See discussion and cases cited beginning at p. 21 of this petition.

district court coupled with the stringent requirements for appeal from that finding. A finding of liability has triggered a chain of enormous (and perhaps completely unnecessary[5]) costs, while at the same time the failure to award broad-based relief has shielded that finding from appellate review. In such circumstance, lower court rulings have the effect of being determinative of the rights and obligations of the parties. It is submitted that the judicial process cannot, consistent with due process of law, confer such weight to a lower court finding of liability. A timely and meaningful review of that finding is a necessary safeguard prior to the imposition of extraordinary non-recoverable costs upon any party to the litigation.

Conversely, where a trial is properly bifurcated between liability and relief, the relief stage of the trial (occasioned by a

5. Petitioner contends that numerous rulings of the District Judge upon which Stage I liability is predicated will be overturned eventually on appeal, thus rendering all or most of Stage II an unnecessary effort and expense. These rulings are predicated on numerous fundamental errors, *e.g.*, (1) The District Judge failed to give due weight to the decisions of this Court, *e.g.*, *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977) (significant constitutional questions are raised pertaining to plaintiff's standing to represent a class whose members did not possess the same interest and suffer the same injury as she did; plaintiff, hired as a professional engineer before the effective date of Title VII, was permitted to represent a class whose members included the full range of categories of employees at petitioner's Kearny Works as well as applicants for employment, see Statement of Facts, p. 8 of this petition); *United Airlines v. Evans*, 431 U.S. 553 (1977) (the District Judge's conclusion that claims are actionable from July 2, 1965 when they are predicated on an EEOC charge filed in 1972); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *Teamsters v. United States*, 431 U.S. 324 (1977) (the District Judge's failure to give due consideration to the concept of relevant labor pools); (2) the facts do not support the liability findings; indeed, the District Judge, in his opinion, has made no findings at all with respect to two of the seven practices found discriminatory, *i.e.*, discharge and transfer into Kearny; and (3) the District Judge's denial of petitioner's recusal motion after two days of trial based upon an incident involving his law clerk, would, if reversed, overturn the judgment in its entirety.

finding of liability with no attendant right of appeal) proceeds in the same manner as the liability stage, *i.e.*, without imposition of extraordinary non-recoverable costs on any party; that properly bifurcated trial is no different than if the trial had not been bifurcated at all except that it has the advantage of economy of effort and cost in the event that no liability is found. See discussion beginning at p. 18, *infra*.

The coercive effect of the present posture, not only upon petitioner but upon all Title VII class action defendants, is plain. The unmistakable message is that Title VII class action defendants must settle at an early stage of the litigation because after a finding of liability, the cost of defending themselves is, as a practical matter, prohibitive.

Because petitioner believes that its due process rights have been violated and because of the manifest importance of the issues raised herein to it and other litigants in Title VII class actions, petitioner files this petition.

B. Statement of Facts

This is a Title VII, 42 U.S.C. §2000e *et seq.*, class action commenced by respondent Kyriaki Cleo Kyriazi (hereinafter "plaintiff") against petitioner alleging sex discrimination at its Kearny Works manufacturing facility located in Kearny, Hudson County, New Jersey. Plaintiff was hired by petitioner before the effective date of Title VII and was employed at its Kearny Works as a professional engineer and information systems staff member until her termination on November 19, 1971.

Despite the fact that plaintiff had held no position with petitioner outside the professional engineering and information systems fields, the certified class, containing potentially 10,000 class members, was defined as "all women who are now or at any time since June 9, 1971, have been employed by defendant

Western Electric Company, or who sought employment with said company during the pendency of this suit, at the Kearny Works organization . . ." Order dated July 16, 1975.

Plaintiff originally alleged a pattern of sex discrimination with respect to four of the six major job groupings at Kearny, contending that the class members were denied jobs as supervisors, professionals, technicians and skilled craftsmen. These four major job groupings contain approximately 100 different job classifications including, *e.g.*, physician, reference librarian, planning engineer, and photographer. Prior to trial, plaintiff expanded her claim to include the two remaining major job groupings at the Kearny Works, *i.e.*, operative employees (including service workers and laboratory technicians) and clerical employees.

C. Procedural History Relevant to this Petition

The present posture is a direct result of the District Judge's abrogation of his order of bifurcation dated October 14, 1975 setting forth the ground rules upon which the trial of Stage I took place.

The order of October 14, 1975 provides:

> "That the issues raised by the complaint herein shall be tried in two separate and independent stages, to wit, the issues of liability of the defendant Western Electric to the class *and of class relief*, and of the liability of all defendants to the named plaintiff, Kyriaki Cleo Kyriazi, *and the relief* to which she may be entitled, shall be severed from the determination of the amount of back pay or other specific relief for individual members of the class;"

(App. D, p. 208a) (emphasis added). Petitioner, acting in reliance upon the 1975 order of bifurcation to its irreparable prejudice, prepared, marshalled and tried its Stage I case.

The first stage of the bifurcated trial which commenced in July, 1977 consumed 49 days; thousands of documents were introduced into evidence by both parties, and nearly 70 witnesses were called.[6] All involved understood that all proofs as to liability and relief save for individual awards, if any, to members of the class were to be heard and determined at Stage I. The question of class-wide relief was the subject of proposed findings of fact and briefs by all parties submitted at the close of Stage I.

Notwithstanding the above ground rules, the District Judge, in his opinion (App. B, p. 30a) and judgment and order (App. B, p. 168a) dated October 30, 1978, did not award class relief, did not enjoin petitioner from engaging in the practices (*e.g.*, discriminatory layoff policy) he found unlawful, and did not award relief to the individual plaintiff.

In his October 30, 1978, opinion (App. B, p. 30a) and judgment and order (App. B, p. 168a) the District Judge held that petitioner had discriminated against the class with respect to seven employment practices: hiring, promotion, transfer into the Kearny Works, layoff, discharge, participation in training

6. Prior to trial petitioner obtained a writ of mandamus from the Court of Appeals for the Third Circuit directing the District Judge to permit petitioner to discover the claims of individual class members for use in preparing its Stage I defense. *Western Electric Co., Inc. v. Stern*, 544 F.2d 1196 (3d Cir. 1976), *reh. den.*, 551 F.2d 1 (3d Cir. 1976). Despite the issuance of that writ, the District Judge denied petitioner's subsequent motion to require specific answers to its interrogatories concerning those claims. Petitioner therefore filed a second petition for a writ of mandamus with the Court of Appeals in an effort to obtain meaningful discovery necessary to its defenses on liability. The petition was denied without opinion. As a result, petitioner was effectively barred from uncovering even a single concrete claim by any class member in advance of the Stage I proceedings.

programs, and opportunities for testing.[7] He also found that petitioner had discriminated against plaintiff Kyriazi on the basis of sex.[8]

The District Judge, recognizing his departure from the terms of his bifurcation order, nevertheless denied petitioner's Rule 59(e) motion to amend his October 30, 1978 judgment and order to specify relief to both the class and the individual plaintiff.[9] Perhaps losing sight of his pre-trial denial of petitioner's right to discover the claims of individual class members, the District Judge explained his refusal to abide by his bifurcation order as follows:

> "I do not feel competent to decide what injunctive relief that I will grant until I have a better idea what the scope of this class is and just what went on, woman by woman, in that plant."

November 9, 1978 Tr. p. 50, 11.7-10.

7. While it is clear that Stage II proceedings may flow only from Stage I findings, the District Judge has recently undertaken to expand Stage II proceedings by ruling on July 16, 1979 that individual class members may make claims at Stage II with respect to downgrading (movement to a lower graded position) and recall from layoff although no claims and no findings were made with respect to these issues at Stage I.

8. The District Judge subsequently vacated a portion of his decision not pertinent to this petition by order dated July 17, 1979 (App. D, p. 216a).

9. At the hearing on petitioner's Rule 59(e) motion, counsel for petitioner pointed out that petitioner was merely seeking compliance with the District Judge's bifurcation order. Petitioner argued at that time that it was prejudiced by the abrogation of the bifurcation order. November 9, 1978 Transcript.

The District Judge, in response to petitioner's subsequent request that he certify his finding of liability pursuant to 28 U.S.C. §1292(b), asserted that he had no power to certify that finding, adding that even were it within his power to certify he would not do so.

To be sure, the District Judge has given his reasons for changing the ground rules,[10] but these statements are not and should not be sufficient to preclude the granting of the writ. One stated reason pertained to additional proofs required by the District Judge in regard to the class representative's individual case. The additional proofs were received at trial on May 1, 1979.[11] They consumed 68 pages of transcript (most of which pertains to discussion among the court and the attorneys) and certain updating of documents previously introduced at trial in 1977. The second stated reason pertained to additional proofs required by the District Judge in order to fashion injunctive relief.[12] The stated objective here is that from the trial of Stage II cases the District Judge would be in a better position to evaluate the extensiveness of the alleged discrimination. Even quite apart from the fact that this posture (1) violates the ground rules upon which Stage I was tried and (2) compels petitioner to finance part of Stage I, the posture of Stage II trials is not calculated to achieve the stated objective until virtually all of the Stage II cases are tried. This is so because (1) petitioner has been found liable with respect to several distinct kinds of discrimination and (2) the Stage II trials are proceeding on the basis of first claim

10. The definitive statement of the District Judge's reasons was to be forthcoming in his opinion on order denying petitioner's Rule 59(e) motion to alter or amend the judgment. Petitioner's proposed order on the motion, submitted on December 12, 1978, has not been entered by the District Judge and no opinion has issued.

11. The District Judge has issued a draft opinion with respect to Kyriazi's individual claims. He has indicated that a final opinion may issue as early as September, 1979, as soon as plaintiff's claim for attorneys' fees and costs with respect to the individual claim can be resolved.

12. It is patently clear that a *prohibitive* injunction could have, and should have, been issued upon the finding of liability at Stage I. The District Judge never did, in fact, attempt to explain why such a prohibitive injunction did not issue. See discussion beginning at p. 9, *supra*, as to the Stage I ground rules which included the fashioning of injunctive relief.

filed, first tried. There is no way that this procedure can accomplish the stated objective in an expeditious manner.[13]

Simply put, the "stated reasons" do not explain the pell mell rush[14] to Stage II trials, with all of its attendant consequences, prior to completing Stage I. On the other hand, the enormous consequences of Stage II, including its potentiality for being a wasted effort, do explain the need for immediate relief from this Court.

Regardless of the District Judge's stated purpose, he acknowledged that the effect of his refusal to award any relief at the end of Stage I in accordance with the terms of his bifurcation order, when combined with his refusal to certify the liability issues for appeal, was to deprive petitioner of its contemplated right of appeal prior to embarking on the long and costly proceedings envisioned at Stage II. November 9, 1978 Tr. p. 43, l.23 to p. 44, l.20.

On February 21, 1979, to establish the parameters of the Stage II litigation, the District Judge issued an opinion and

13. Arguably, a litigant may be required to go to Stage II at the same time an appeal from Stage I is pending. That possibility is inappropriate here because an appeal from Stage I is not possible now, is not possible in the forseeable future because the District Judge has geared the completion of Stage I to findings which can only be made after extensive Stage II trials, and can only come after the expenditure of enormous sums of non-recoverable monies. This is not to say that at no point in these proceedings will there be a place for a special master. Here, however, Stage II is not an independent focus. Rather, Stage II has the effect of delaying Stage I. While that effect was not at first apparent, it is now abundantly clear that petitioner may have no right of appeal until Stage II is virtually completed.

14. The District Judge has made it plain that he would not delay any aspect of Stage II proceedings based upon any consideration of completing Stage I.

order of reference and guidelines for special masters (App. C, p. 170a), amended by order dated March 6, 1979 (App. C, p. 206a).[15] Pursuant to that order of reference, a Stage II claimant, to obtain relief with respect to each of the practices held to be discriminatory, needs only demonstrate: (1) that she is a member of the class; and (2) that, *e.g.*, "she was not promoted to an available position" or that "she was laid off" or "discharged." The burden then shifts to petitioner to prove that the claimant should not have been promoted, laid off, discharged, etc. Nearly two thousand claimants have filed claims in Stage II to date. Hearings on those claims commenced in April 1979. It is anticipated that resolution of those claims will take years.

Moreover, despite the fact that plaintiff had obtained no relief at Stage I, and acknowledging the failure of plaintiff's counsel to comply with the prerequisites for attorneys' fees awards spelled out by the Court of Appeals for the Third Circuit, February 27, 1979 Tr. p. 43, 11.1-21; March 6, 1979 Tr. p. 3, 1.24 to p. 4, 1.1, the District Judge nevertheless directed petitioner to pay to plaintiff's counsel the sum of $280,834.49 in "temporary interim" attorneys' fees by order dated February 27, 1979 (App. D, p. 211a).[16] Petitioner paid plaintiff's counsel the full $280,834.49 by March 12, 1979.

15. By order dated March 2, 1979 (App. C, p. 205a), the District Judge appointed three special masters to conduct Stage II proceedings. Compensation for the masters, payable by petitioner on a quarterly basis, was set at $125 per hour for one master and $115 per hour for the other two. The District Judge added a fourth master at $100 per hour by order dated July 16, 1979 (App. D., p. 215a).

16. The District Judge also directed petitioner to pay counsel for plaintiff, on a quarterly basis, her attorneys' fees and costs incurred during Stage II. Although he agreed to stay the award of quarterly fees, he refused to stay his award of $280,834.49. Order dated March 9, 1979 (App. D, p. 213a). The District Judge continued to deny a stay, despite plaintiff's counsel's inability to obtain the bond he had originally required, March 6, 1979 Tr. p. 14, 1.23 to p. 15, 1.6, and fully aware of the resulting prejudice to petitioner, March 6, 1979 Tr. p. 16, 11.1-4. The avowed purpose of the fee award was to finance Stage II of the litigation. February 27, 1979 Tr. p. 49, 11.12-21; March 6, 1979 Tr. p. 11, 11.3-11; April 18, 1979 Tr. p. 36, 11.15-16.

On March 27, 1979, petitioner filed its notice of appeal from that part of the District Judge's order of February 27, 1979, awarding interim attorneys' fees to plaintiff's counsel. On that same date, petitioner filed with the Court of Appeals for the Third Circuit its petition for writ of mandamus and prohibition (App. A, p. 5a).[17]

By order dated April 25, 1979, a two judge panel of the Court of Appeals denied the petition for writ of mandamus and prohibition (App. A, p. 1a). On May 9, 1979, petitioner filed its petition for rehearing and for rehearing en banc of its petition for writ of mandamus and prohibition with that court (App. A, p. 19a).

By order dated May 18, 1979, the Court of Appeals denied petitioner's petition for rehearing and for rehearing en banc (App. A, p. 3a). The panel that denied petitioner's initial petition had been comprised solely of Judges Aldisert and Higginbotham. Chief Judge Seitz was the only other judge who considered the petition for rehearing. The order denying the latter petition contained the following note: "Chief Judge Seitz would grant rehearing were it legally possible," and an additional note: "Judges Adams, Gibbons, Rosenn, Hunter, Weis and Garth did not participate in the consideration of this matter," despite the customary disposition of petitions for rehearing in the Third Circuit by the full court. The docket entry of the Third Circuit (App. A, p. 4a) indicates only that the six judges who did not participate were, for some reason, "disqualified".

17. The appeal of the attorneys' fee order was taken pursuant to the collateral order doctrine under 28 U.S.C. §1291. The petition for writ filed the same day also covered the attorneys' fee order in anticipation of plaintiff's argument, later set forth in her answering brief on the appeal, that the attorneys' fee order is not appealable. The appeal is presently pending (Case No. 79-1564) and all briefs have been filed.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ may be summarized as follows:

1. A vital issue of first impression is involved concerning the administration of class actions under Title VII of the Civil Rights Act of 1964 with a potentially enormous impact on all like complex litigation. That issue is whether the federal courts may, consistent with due process of law as guaranteed by the Fifth Amendment to the United States Constitution, require Title VII class action defendants to finance the litigation of thousands of Stage II individual claims through the expenditure of millions of dollars of extraordinary non-recoverable costs, prior to the entry of a final or otherwise appealable order as to the underlying rulings upon which Stage II is based.

2. The District Judge's *ex post facto* abrogation of his standing order governing the conduct of the Stage I trial deprived petitioner of its due process right guaranteed by the Fifth Amendment to the United States Constitution to make a reasoned and informed judgment as to how to defend itself at Stage I.

3. The District Judge's order awarding temporary interim attorneys' fees in the amount of $280,834.49 prior to any award of relief on the merits is in direct conflict with two decisions of this Court. *Bradley v. Richmond School Board,* 416 U.S. 696 (1974); *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968).

4. The denial of the writ of mandamus and prohibition by the Court of Appeals in this case has jeopardized the availability of that writ, as approved by this Court, to remedy excesses of judicial power and to ensure the proper administration of justice in the federal courts.

I.

A. Petitioner's Property Has Been Taken Without Due Process of Law.

The present posture is that petitioner is required to pay the extraordinary non-recoverable costs of 2,000 Stage II trials despite the fact that no final or otherwise appealable order has issued as to the underlying rulings which gave rise to the occasion for Stage II. Petitioner contends that financing litigation against itself is a taking of property without due process of law.

In accordance with the District Judge's 1975 bifurcation order and his instructions at trial, it was understood that any finding of liability at Stage I would be accompanied by class-wide relief and relief to the named plaintiff. The express language of that order reserved to Stage II only "the amount of back pay or other specific relief" due individual class members.[18] Nevertheless, despite the finding that petitioner had engaged in "pervasive" sex discrimination with respect to seven major

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18. The implications of this severance were clear: If petitioner were found at Stage I to have engaged in unlawful employment practices under Title VII, entry of an order enjoining such practices would be mandatory at that point. *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *see Albemarle Paper Co. v. Moody,* 442 U.S. 405, 418 (1975). That injunction would be appealable to the Court of Appeals as of right under 28 U.S.C. §1292(a)(1). The long-established practice of the Court of Appeals for the Third Circuit has been to review the underlying basis for the injunction upon such appeal. *E.g., W. L. Gore & Associates, Inc. v. Carlisle Corp.,* 529 F.2d 614, 618 (3rd Cir. 1976); *Kohn v. American Metal Climax, Inc.,* 458 F.2d 255, 262 (3rd Cir. 1972), *cert. denied,* 409 U.S. 874 (1972); *Hook v. Hook & Ackerman, Inc.,* 233 F.2d 180, 182 (3rd Cir. 1956), *cert. denied,* 352 U.S. 960 (1957). This practice is supported by the rulings of this Court. *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940); *Highland Avenue & Belt Rr. Co. v. Columbian Equip. Co.,* 168 U.S. 627, 630 (1898); *Smith v. Vulcan Iron Works,* 165 U.S. 518, 525 (1897).

employment practices, the District Judge declined to award any relief at Stage I. Instead, he elected immediately to commence proceedings for the Stage II trials of claims advanced by a potential class of 10,000 members before special masters to be compensated by petitioner. The District Judge further required that petitioner compensate plaintiff's counsel on a quarterly basis for all services rendered and costs incurred in Stage II.[19] Petitioner is thus forced to shoulder the entire financial burden of long and costly Stage II proceedings despite the absence of any final or otherwise appealable order as to the underlying rulings upon which Stage II is based.[20] Moreover, petitioner has been compelled to pay interim attorneys' fees to plaintiff's counsel for Stage I of these proceedings with the avowed purpose of subsidizing the litigation against petitioner at Stage II.

The posture of this case is predicated solely on the liability finding made by the District Judge. While the practice of bifurcating a trial as to liability and relief has been followed in other cases, a liability finding in those cases has not been the occasion for varying from acceptable notions of due process in the procedure for the trial of the relief stage of the case. *See Gasoline Products Company, Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

The concept of trial bifurcation, separating the liability and relief issues, represents no real departure at all from the traditional trial of all issues together; trial of the facts relating to

19. The District Judge did stay his award of attorneys' fees and disbursements to be paid plaintiff's counsel on a quarterly basis during Stage II (App. D, p. 213a). However, the threat of that order to finance, in effect, plaintiff's entire conduct of Stage II remains outstanding, it being unclear what event will trigger the lifting of the stay.

20. Petitioner estimated in the Court of Appeals that its payments to special masters alone at Stage II could exceed three million dollars.

relief proceeds before the court as it would have had those facts been tried together with liability. The one great practical advantage of such bifurcation in a case in which proofs as to relief are complex is the elimination of the need for such proofs if liability is not found.

Thus, had the District Judge bifurcated this case as to liability and relief prior to trial (rather than abrogating his standing bifurcation order *ex post facto* to petitioner's prejudice, *see* discussion, *infra*) he could not, consistent with the accepted concept of trial bifurcation, have done what he did in this case, *i.e.*, utilized his liability finding to shift to petitioner the extraordinary non-recoverable costs which he has here imposed on it. *See In re Master Key Antitrust Litigation*, 528 F.2d 5, 14-15 (2d Cir. 1975). *See generally, State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 311-312 (5th Cir. 1978); *Kisteneff v. Tiernan*, 514 F.2d 896, 897 (1st Cir. 1975); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 351 (E.D. Pa. 1976); *LoCicero v. Humble Oil & Refining Co.*, 52 F.R.D. 28, 29-30 (E.D. La. 1971).

B. Petitioner Has Been Denied Its Due Process Right to a Fair Trial.

Almost two years prior to the trial of this case, the District Judge entered a bifurcation order establishing the ground rules for trial. It is unassailable that petitioner had the right to rely upon those ground rules in determining its entire approach to Stage I. The *ex post facto* abrogation of the bifurcation order upon which petitioner relied to its utlimate prejudice is arbitrary and capricious and is otherwise in violation of petitioner's due process right to a fair trial.

The abrogation of the bifurcation order after the Stage I trial irreparably prejudiced petitioner's ability to make a reasoned and informed judgment as to how to defend itself at Stage I.

For example, despite the District Judge's failure to permit petitioner's discovery of individual class members' claims, petitioner nevertheless contemplated rebutting a sufficient number of those potential claims at Stage I to avoid any finding of discrimination as to significant segments of the putative class. Based on all considerations, however, including the particular bifurcated nature of the trial with the contemplated right of appeal, and its assessment of the strength of plaintiff's Stage I case, petitioner determined not to undertake the enormous cost of rebutting even a representative sample of the hundreds of thousands of hypothetical individual claims at Stage I.

Had petitioner known prior to the presentation of its defense that the District Judge would abrogate his bifurcation order, it would have been prudent for petitioner to rebut individual claims at Stage I. The advantages of such an approach are obvious. First, the burden of proof with respect to individual claims was more favorable to petitioner at Stage I than at Stage II. *Teamsters v. United States,* 431 U.S. 324 (1977). Indeed, the District Judge made full use of this disparity, requiring almost no showing from individual class members at Stage II in order to state a *prima facie* claim (App. C, p. 170a). Furthermore, the rebuttal of individual claims at Stage I would have bolstered petitioner's defense to liability itself, while at Stage II such rebuttal has no effect on liability already established.

Moreover, the meaningful appeal contemplated under the bifurcation order, based on the issuance of injunctive relief in the event of a liability finding, has been foreclosed by the abrogation of that order. The District Judge has not, more than nine months after liability was found in this case, even issued a *prohibitive* injunction to bar those continuing practices which he found to violate Title VII. For example, although he determined that petitioner's layoff procedure as set forth in its current collective bargaining agreement with the IBEW violated Title

VII, the District Judge has not yet enjoined the use of that procedure. He has never offered any explanation as to why he has not by injunction prohibited this or any other practices he found to be discriminatory.

Far beyond merely breaching the terms of his bifurcation order, the District Judge's failure to enjoin practices he expressly found to violate Title VII flies directly in the face of established principles of this and other federal courts under that statute.

Absent clearly unusual circumstances (not asserted in this case) "a grant of injunctive relief is mandatory". *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 354 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978). *See also, Neely v. City of Grenada,* 438 F. Supp. 390 (N.D. Miss. 1977); *Freeman v. Motor Convoy, Inc.,* 409 F. Supp. 1100 (N.D. Ga. 1976); *Miller v. Continental Can Co.,* 13 FEP Cases 1585 (S.D. Ga. 1976); *Sledge v. J. P. Stevens & Co.,* 16 FEP Cases 1652 (E.D. N.C. 1976), *aff'd in part, rev'd in part, remanded in part,* 18 FEP Cases 261 (4th Cir. 1978); *Hill v. Western Electric Co., Inc.,* 12 FEP Cases 1175 (E.D. Va. 1976), 13 FEP Cases 1157 (E.D. Va. 1976), *aff'd in part, rev'd in part,* 596 F.2d 99 (4th Cir. 1979); *Lewis v. Phillip Morris, Inc.,* 419 F. Supp. 345 (E.D. Va. 1976), *vac'd on other grounds,* 577 F.2d 1135 (4th Cir. 1978); *Senter v. General Motors Corp.,* 383 F. Supp. 222 (S.D. Ohio 1974), *aff'd,* 532 F.2d 511 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976); *Robinson v. P. Lorillard Co.,* 319 F. Supp. 835 (M.D. N.C. 1970), *aff'd in part, rev'd in part,* 444 F.2d 791 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1971).

Indeed, this Court has indicated its endorsement of mandatory injunctive relief in appropriate circumstances in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975), holding that where discrimination is found under Title VII:

> ". . . the [district] court has not merely the power but the duty to render a decree which will so far

> as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*"

(emphasis added).

Here, the District Judge ignored without explanation his clear statutory duty, as well as his obligation under his 1975 bifurcation order, to remedy what he found to be clear violations of Title VII.

Petitioner submits that the present posture cannot be tolerated consistent with the requirements of due process of law. The financing of litigation against itself is a taking of property without due process of law. Conditioning the availability of appeal upon the willingness of a defendant to expend millions of dollars of extraordinary non-recoverable costs over a period of several years does not comport with the notion of fundamental fairness inherent in the concept of due process. Nor does the *ex post facto* changing of the ground rules upon which petitioner fully relied to its prejudice comport with the due process right to a fair trial. The posture which presently exists is plainly not correctable on appeal.

II.

The District Judge's Award of Attorneys' Fees Conflicts with the Decisions of this Court.

In February, 1979, the District Judge ordered petitioner to pay to plaintiff's counsel $280,834.49 in "temporary interim" attorneys' fees for Stage I (App. D, p. 211a). He declined to stay that award even when plaintiff's counsel admitted her inability to secure a bond to ensure the return of those fees in the event of

reversal on appeal (App. D, p. 213a).[21] Rather, the District Judge made it clear that it was expected that those funds would be expended to partially finance Stage II.

Congress has restricted awards of attorneys' fees under Title VII to "the prevailing party." 42 U.S.C. §2000e-5(k). In 1974 this Court ensured the proper interpretation of that rule by conditioning such an award, and thus the definition of "prevailing party", on that party's having obtained broad-based relief. *Bradley v. Richmond School Board,* 416 U.S. 696, 723-724 (1974).[22] In its opinion in *Bradley* this Court relied on its

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21. Proceedings on the remainder of plaintiff's counsel's Stage I fee request (more than an additional $700,000) are currently underway.

22. In *Bradley,* this Court considered the propriety of an award of attorneys' fees under §718 of the Emergency School Aid Act, 20 U.S.C. §1617 (which, like Title VII, permitted such an award to the prevailing party) in an action to compel school desegregation. The remedial proceedings in question commenced on March 10, 1970. Defendant admitted culpability, and proposed desegregation plans were submitted. Various plans submitted by both parties were held inadequate on June 26, 1970, August 17, 1970 and January 29, 1971. Defendant's third plan was finally adopted on April 5, 1971 and ordered into effect by the district court, which awarded plaintiff attorneys' fees for services from March 10, 1970 to January 29, 1971.

Mr. Justice Blackmun, writing for the Court, agreed with the dissenting judge in the Court of Appeals that the fee award:

> ". . . did not precisely fit §718's requirement that the beneficiary of the fee order be 'the prevailing party'. In January 1971 the petitioners had not yet 'prevailed' and realistically did not do so until *April 5.* Consequently any fee award was not appropriately made until *April 5.*"

416 U.S. at 723-724 (emphasis added). Judge Winter, who authored the dissent referred to, had first observed that §718 was "substantially similar" to 42 U.S.C. §2000e-5(k), and then stated:

> "Manifestly the entry of that order [on January 21, 1971] cannot support an award of counsel fees for services to the

(Cont'd)

decision six years earlier in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), where it had stated:

> "It follows that *one who succeeds in obtaining an injunction* under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

390 U.S. at 402 (emphasis added). Far from obtaining broad-based relief prior to her award of attorneys' fees in this case, plaintiff had obtained no relief whatsoever. As a result, that award directly conflicts with this Court's decisions in *Bradley* and *Newman*.

Petitioner submits that the immediate attention of this Court is required both to reaffirm its interpretation in *Bradley* and *Newman* of the availability of attorneys' fees to a "prevailing party", an issue of the utmost importance under numerous federal statutes; and, under its general supervisory powers, to proscribe the award of attorneys' fees in the absence of a final or otherwise appealable order upon which the fees are predicated because such an award constitutes the taking of property without due process of law.

III.

The Court of Appeals' Denial of Mandamus Conflicts with the Decisions of this Court.

Petitioner petitioned the Court of Appeals for a writ of mandamus pursuant to 28 U.S.C. §1651(a), seeking to compel

(Cont'd)

> date of its entry because the order *did not grant relief* to the parties seeking to recover fees — *a condition precedent* to the award of fees as set forth in §718."

472 F.2d at 337 (emphasis added).

the District Judge to comply with his order of bifurcation and to withdraw the unauthorized award of attorneys' fees to plaintiff's counsel. For all the reasons set forth above, petitioner submits that the denial of that petition was error.[23]

The Court of Appeals' failure to issue a writ in this case contravenes the principles for granting a writ of mandamus established by this Court in that the circumstances of this case present cogent reasons for the exercise of the power of supervision to ensure the proper administration of justice in the federal courts and to remedy excesses of judicial power.

The present posture represents a denial of petitioner's fundamental rights as a litigant. This Court has expressly approved the use of mandamus to correct the denial of such rights. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).[24] Moreover, it has repeatedly acknowledged the traditional use of mandamus to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so, *Thermtron Products, Inc. v.*

23. It is, of course, possible that the Court of Appeals would have reheard petitioner's petition en banc had not six of its nine members disqualified themselves from participation (App. A, p. 4a).

24. In that case the district court had severed the trial pursuant to Fed. R. Civ. Proc. 42(b), ordering plaintiff's equitable claims to be tried to the court before defendant's legal counterclaim and cross-claim could be tried to a jury. This Court reversed the Court of Appeals' denial of mandamus, holding instead that the writ was appropriate to preserve defendant's fundamental rights:

> ". . . the use of discretion by the trial court under Rule 42(b) to deprive Beacon of a full jury trial on its counterclaim and cross-claim, as well as on Fox's plea for declaratory relief, cannot be justified."

359 U.S. at 508. The decision in *Beacon Theatres, Inc.* was recently reaffirmed in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665, n. 7 (1978).

Hermansdorfer, 423 U.S. 336, 352 (1976); *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943), particularly where the writ is employed to correct "unauthorized action of the district court obstructing the appeal." *Will v. Calvert Fire Insurance Co., supra*, 437 U.S. at 666-667; *Roche v. Evaporated Milk Ass'n., supra*, 319 U.S. at 25. Indeed, this Court only months ago noted that mandamus may be invoked to protect not only a party's right to appeal, but his right to meaningful and timely appellate review. *Connor v. Coleman*, ___ U.S. ___, 59 L. Ed. 2d 619, 622 (1979).[25]

Mandamus is appropriate here under each of the principles set forth above because the District Judge has so far departed from the accepted and usual course of judicial proceedings in this case. The failure of the Court of Appeals to grant the writ, therefore, improperly sustained the District Judge's deprivation of petitioner's fundamental right to a fair trial and a timely and meaningful appeal, as well as its right to property. In addition, it sustained the District Judge's award of temporary interim attorneys' fees, even though that award was beyond the scope of the lawful exercise of his prescribed powers.

25. In that case this Court granted leave to file a petition for mandamus and instructed the district court to file its legislative reapportionment plan sufficiently before June 7, 1979, the filing deadline for candidates for the 1979 election, to ensure an effective right of review of that plan in this Court prior to that deadline.

CONCLUSION

For all the foregoing reasons, petitioner Western Electric Company, Incorporated, prays that a writ of certiorari to the Court of Appeals for the Third Circuit be granted, enabling this court to review the Court of Appeals' order denying petitioner's petition for writ of mandamus and prohibition filed with that court which sought an order (1) directing the Honorable Herbert J. Stern, United States District Judge, United States District Court for the District of New Jersey, to issue his opinion and order with respect to relief to be accorded the individual plaintiff and plaintiff class in accordance with his order of bifurcation filed October 14, 1975, (2) prohibiting him from proceeding with the second phase of this action as described in the aforementioned order until he has decided the first phase of the action under that order, and (3) directing him to vacate his order of February 27, 1979, requiring the payment of attorneys' fees to plaintiff's attorney and require him to enter an order directing that said payments be returned to petitioner or, in the alternative, deposited with the clerk of the district court.

In the alternative, petitioner prays that a writ of certiorari be issued under 28 U.S.C. §1651(a) to review directly the question whether the District Judge should be directed to act, and be prohibited from acting, in accordance with the foregoing.

Respectfully submitted,

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Dated: August 16, 1979

Appendices

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 25, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

79-1380

WESTERN ELECTRIC COMPANY, INCORPORATED,

Petitioner

vs.

HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,

Nominal Respondent

KYRIAKI CLEO KYRIAZI,

Respondent

Present: ALDISERT and HIGGINBOTHAM, *Circuit Judges.*

ORDER

After consideration of the petition and the answer, it is

ORDERED that the prayer of the petition be and the same is hereby denied;

Appendix A — Order of the United States Court of Appeals for the Third Circuit Dated April 25, 1979

The order previously entered on April 3, 1979, staying the award of attorney's fees pending the consideration of the petition for mandamus is vacated.

BY THE COURT,

s/ Aldisert
Circuit Judge

DATED: April 25, 1979

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 18, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1380

[SAME TITLE]

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,** and ALDISERT and HIGGINBOTHAM, *Circuit Judges.***

The peition for rehearing filed by

Petitioner

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: May 18, 1979

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* Chief Judge Seitz would grant rehearing were it legally possible.

** Judges Adams, Gibbons, Rosenn, Hunter, Weis and Garth did not participate in the consideration of this matter.

APPENDIX A — EXCERPT FROM THE GENERAL DOCKET OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

79-1380

Form A.O. 147 (July 1958)

GENERAL DOCKET Western Electric Co., ...

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

25

APPEAL/PETITION	CASE NO.
PETITION FOR WRIT OF MANDAMUS AND PROHIBITION	79-1380

TITLE OF CASE	ATTORNEYS FOR APPELLANT
WESTERN ELECTRIC COMPANY, INCORPORATED, Petitioner vs. HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY, Nominal Respondent KYRIAKI CLEO KYRIAZI, Respondent Judges Adams, Garth, Gibbons, Rosenn, Van Dusen, Weis disqualified	S. Joseph Fortunato Edward P. Lynch Pitney, Hardin & Kipp **ATTORNEYS FOR APPELLEE** Judith P. Vladeck [Kyriaki Cleo Kyriazi] Vladeck, Elias, Vladeck & Engelhard

No. BELOW:

JUDGE BELOW:

DATE OF JUDGMENT:

NOTICE OF APPEAL FILED: Petition filed March 27, 1979

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
1979				
Mar. 27	Clerk's Fees	50 00		

APPENDIX A — PETITION FOR WRIT OF MANDAMUS AND PROHIBITION (Exhibits Not Included)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.

WESTERN ELECTRIC COMPANY, INCORPORATED,

Defendant-Petitioner,

-vs-

HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,

Nominal Respondent,

KYRIAKI CLEO KYRIAZI,

Plaintiff-Respondent.

Western Electric Company, Incorporated, through its undersigned counsel, respectfully petitions this Court to issue a writ of mandamus and prohibition (1) directing the Honorable Herbert J. Stern, United States District Judge, United States District Court for the District of New Jersey to issue his opinion and order with respect to relief to be accorded the individual plaintiff and plaintiff class in accordance with his Order of bifurcation filed October 14, 1975, (2) prohibiting him from proceeding with the second phase of this action as described in the aforementioned Order until he has decided the first phase of the action under that Order, and (3) directing him to vacate his Order of February 27, 1979 requiring the payment of attorney's

fees to plaintiff's attorney and require him to enter an order directing that said payments be returned to Western or, in the alternative, deposited with the Clerk of the District Court. The Orders involved on this petition are:

(1) Order dated October 14, 1975 (annexed hereto as Exhibit A) which provided for the bifurcation of this action as follows: "That the issues raised by the complaint herein shall be tried in two separate and independent stages, to wit, the issues of liability of the defendant Western Electric to the class and of class relief, and of the liability of all defendants to the named plaintiff, Kyriaki Cleo Kryiazi, and the relief to which she may be entitled, shall be severed from the determination of the amount of back pay or other specific relief for individual members of the class;"

(2) Order dated October 30, 1978 (annexed hereto as Exhibit B) in which the District Judge reflected his rulings after trial, but only as to liability of defendants to the individual plaintiff and plaintiff class. It should be noted that with respect to the October 30, 1978 Order, defendants on November 9, 1978, filed a motion under Fed. R. Civ. P. 59(e) to modify and amend the judgment. On November 9, 1978 the District Judge denied that portion of the motion relevant to this Petition. To date, despite the agreement of all counsel to the form of a proposed order, no order has yet been entered by the District Judge. The proposed Order is annexed hereto as Exhibit C;

(3) Order dated February 21, 1979 captioned "Order of Reference and Guidelines for Special Masters" (copy annexed hereto as Exhibit D) which establishes the procedures and conditions for the second phase of this bifurcated action.

(4) Order dated February 27, 1979 requiring the payment by Western to plaintiff's counsel of the sum of $280,834.49 in "temporary interim" attorney's fees and costs. (Copy annexed hereto as Exhibit E).

FACTS:

I

This is a Title VII, 42 U.S.C. §2000e *et seq.*, action commenced by plaintiff-respondent, Kyriaki Cleo Kyriazi ("Kyriazi") against defendant-petitioner Western Electric Company, Incorporated ("Western") alleging an "across the board" pattern and practice of sex discrimination in employment at Western's Kearny Works located at Kearny, Hudson County, New Jersey*.

II

The District Judge certified this action as a class action under Fed. R. Civ. P. 23(b)(2) by Order dated July 16, 1975 and described the class therein as ". . . all females who are now or at any time since June 9, 1971 have been employed by defendant Western Electric Company, or who sought employment with said Company during the pendency of this suit, at the Kearny works organization; . . ."

III

By Order dated October 14, 1975 the District Judge, pursuant to plaintiff's request, bifurcated this action as follows:

* There are five individual defendants, also represented by counsel for Western, who are defendants in plaintiff's individual case only and not in the class action.

". . . the issues raised by the complaint herein shall be tried in two separate and independent stages, to wit, the issues of liability of the defendant Western Electric to the class *and of class relief,* and of the liability of all defendants to the named plaintiff, Kyriaki Cleo Kyriazi,*and the relief to which she may be entitled,* shall be severed from the determination of the amount of back pay or other specific relief for individual members of the class;" (Emphasis added).

IV

Trial of Stage I commenced on July 7, 1977 and concluded on December 1, 1977, consuming 49 trial days. Nearly 70 witnesses were called. By the end of February 1978 the parties filed voluminous proposed findings of fact and conclusions of law covering all issues including relief. The District Judge issued his Opinion and Judgment and Order on October 30, 1978. The Opinion is reported at ___ F.Supp. ___, 18 FEP Cases 924 (D.N.J. 1978). The District Judge concluded in his Opinion that Western had discriminated against the class with respect to seven broad employment practices: (1) hiring (both as to rejecting applicants for hire altogether, and as to hiring them at low levels), (2) promotion, (3) transfer into the Kearny Works, (4) layoff, (5) discharge, (6) participation in training programs, and (7) opportunities for testing.

V

On the first page of his Opinion with respect to the class action the District Judge, despite his previously entered and standing Order of bifurcation, stated:

> "The issue of liability having been severed from that of damages, the case was tried on the liability issue alone . . ."

With respect to the individual plaintiff's claims the District Judge found that because of her sex she was paid too little, rated too low in her performance, and denied promotion. He further found that she was terminated from employment because she had previously filed a sex discrimination complaint with the New Jersey Division on Civil Rights. Nevertheless he stated:

> "However, the Court will not now attempt to fix the performance rating and rank or salary which Kyriazi should have received while at Western. For although the case was bifurcated only as to the class, the Court has determined to defer the question of the appropriate amount of damages to the second stage of trial. Thus, these determinations will abide the second stage of trial.
>
> * * *
>
> Among the type of relief which *will* be awarded to Kyriazi at the second stage are *reinstatement*, back pay and retroactive benefits. (Emphasis added).

Thus, the District Judge did not comply with his own bifurcation Order.

VI

Western moved to amend the Order and Judgment pursuant to Rule 59(e) seeking to require the District Judge to comply with his own bifurcation Order, *i.e.*, asking that he proceed to determine relief to be awarded the class and plaintiff Kyriazi before proceeding with Stage II of the case dealing with individual class members' claims.

At a status conference called by the District Judge on November 9, 1978, he denied Western's motion to amend the Order and Judgment to proceed in accordance with his bifurcation Order. He stated that he needed further trial as to Kyriazi's claims, and could not decide classwide relief until the Stage II trial of individual class members claims had taken place. He also denied Western's alternative request to certify the case for appeal to this Court under 28 U.S.C. §1292, stating that the case was not properly certifiable. The District Judge further stated that even if he could certify the matter for appeal he would not do so. While he recognized that Stage II proceedings would be extremely time-consuming and costly to Western, and that in the event that his liability findings are eventually reversed on appeal, Stage II will have been in vain, he nevertheless expressed concern that an appeal would delay relief to class members, stating "I can't be blind to the fact that some of these women may die."

VII

The District Judge has appointed three Special Masters to preside over the trial of individual class members' claims. These claims are to be divided among the three Special Masters with discovery and trials proceeding in three "forums" simultaneously. The District Judge has set the rate of the Special Masters compensation as follows:

Special Master Bernard Hellring, Esq.	$125 per hour
Special Master Thomas B. Campion, Esq.	$115 per hour
Special Master Bruce I. Goldstein, Esq.	$115 per hour

and directed that Western pay for their cost. It is estimated that there are nearly 10,000 class members. More than 1100 have so far submitted claims to the Clerk of the District Court.

VIII

On January 22, 1979 plaintiff's counsel submitted an affidavit in support of her claim for attorney's fees for Stage I of the case seeking $442,105.00 in fees and $119,563.98 in costs, and requesting a "doubling" of the fee claim. Western opposed the application.

The District Judge (1) required Western's counsel to disclose to him what he had billed Western for services and the number of hours his firm spent on the case, (2) on February 27, 1979 awarded plaintiff's counsel $280,834.49 in "temporary interim" fees (representing one-half of her basic claim), stating that he would take steps to protect Western's interests by requiring plaintiff's counsel to obtain a surety bond, and (3) when on March 6, 1979, he found that plaintiff's counsel's firm could not be bonded, nevertheless directed payment by Western.

IX

Although the District Judge stated at a status conference held on January 22, 1979 that he would enter an order on Western's Rule 59(e) motion, he has not done so. He has, however, continued to press forward with Stage II proceedings. The parties were directed to, and did, meet with the three Special Masters on March 6, 1979 to determine the course of proceedings for Stage II. Stage II Depositions and Trials were stayed by the Special Masters pursuant to the joint request of the parties due to ongoing settlement discussions. A further joint request for a stay was denied. Thirty Stage II cases are now scheduled for trial beginning April 6, 1979. Commencement of those trials will prejudice Western's position in this matter.

ISSUES PRESENTED HEREIN:

1. Does the District Judge have the power to abrogate his Order of bifurcation of the trial in this case after the trial of the first stage of the case where his doing so results in prejudice to defendant Western Electric Company, Incorporated?

2. Does the District Judge have the power, by abrogating his Order of bifurcation after trial, to block appellate review by this Court which was clearly contemplated by that Order?

3. Does the proper administration of justice require that the District Judge comply with his own Order bifurcating this action which he has abrogated after trial of the case, and that he be prohibited from proceeding with the second stage of this action until he has completed the first stage?

4. Does the District Judge have the power to award interim attorney's fees and costs to plaintiff's counsel where plaintiff is not a "prevailing party" at this point in the litigation and where the District Judge has acknowledged that the fee application is not in conformity with the standards developed by this Court?

RELIEF SOUGHT BY THIS PETITION:

Western asks this Court to:

1. Direct the District Judge to comply with his own bifurcation order, to wit: to grant classwide relief and relief to Kyriazi based on the record at Stage I; and

2. Prohibit the District Judge from conducting (whether through special Masters or otherwise) any proceedings in connection with Stage II of this action as set forth in the

bifurcation Order, to wit: the processing of the claims of individual class members until such time as Stage I of the action has been completed.

3. Direct the District Judge to vacate his Order of February 27, 1979 requiring the payment of attorney's fees to plaintiff's counsel and require him to enter an order directing that said payments be returned to Western or, in the alternative, deposited with the Clerk of the District Court, and prohibit him from conducting further proceedings in connection with plaintiff's counsel's application for attorneys' fees and costs.

THE WRIT SHOULD BE ISSUED FOR THE FOLLOWING REASONS:

1. The procedural posture of this case which necessitates the Petition for Writ of Mandamus and Prohibition is the failure of the District Judge to comply with his own Order bifurcating trial.

As of October 14, 1975 (nearly two years prior to the commencement of trial) and throughout trial and post trial proceedings, Western knew that it would be able to appeal any adverse ruling at the end of Stage I. Had Western known sufficiently in advance of trial of any abrogation of the bifurcation Order, it may well have proceeded differently prior to trial or tried its case differently. Had Western known before trial, for example, that the case was bifurcated differently, *i.e.*, liability only at Stage I and all relief at Stage II, it could have anticipated that it might have no right of appeal, in the event liability were found, until it had tried the Stage II individual claims. Under these circumstances Western may well have elected to defend by rebutting individual claims at Stage I, as this Court had earlier noted it could, *Western Electric Co., Inc.*,

v. Stern, 544 F.2d 1196 (3rd Cir. 1976), *reh. den.*, 551 F.2d 1 (3rd Cir. 1976). There would have been clear advantages to doing so: (1) the burden of proof with respect to individual claims was more favorable to Western at Stage I rather than at Stage II, (2) the rebuttal of individual claims at Stage I would have bolstered Western's defense to liability itself, while at Stage II such rebuttal will have no effect on the liability already established, and (3) the claims would have been tried before the Court instead of Special Masters with substantial savings in cost to Western.

The District Judge's *ex post facto* abrogation of his bifurcation Order, which was to govern the conduct of the trial, has irreparably prejudiced Western's right to make an informed judgment as to how to defend itself at Stage I of this case. The District Judge has no power to prejudice a party litigant as he has done here.

2. The courts have invariably issued prohibitive injunctions upon findings of liability in Title VII class actions, *i.e.*, they have enjoined the employment practices found to be discriminatory. The issuance of such relief was clearly contemplated by the District Judge's bifurcation Order at Stage I of this case. He has, however, awarded no relief, and instead has proceeded with Stage II.

It is clear that the entry of injunctive relief would be appealable as of right to this Court, and that this Court could on such appeal in its discretion review the underlying liability findings. It is also clear that it is unnecessary to try Stage II in order to issue an injunction, particularly a *prohibitive* injunction. For example, the District Judge found that the layoff procedure contained in the currently effective collective bargaining agreement between Western and Local 1470, IBEW

violated Title VII. Certainly no further facts are needed to enjoin that procedure. The same observation can be made with respect to the other six employment practices found to be discriminatory.

The failure of the District Judge to enter a prohibitive injunction against Western barring it from continuing those employment practices is (1) inconsistent with his expressed concern for the class members, and (2) in no way barred by a "need" to adduce further facts. There is no question that the failure to enter such relief is not predicated on reasonable grounds and has acted only to obstruct appeal. Such action is clearly correctable by issuance of a writ of mandamus.

3. Western is now faced with an enormously time consuming and expensive proceeding at Stage II without having the opportunity for review by this Court of the Stage I findings which was clearly contemplated by the bifurcation Order. As noted, there are nearly 10,000 class members. At present, of course, it cannot be determined how many will come forward to assert claims; as of now, 1100 have. It is estimated that if the three Special Masters, sitting separately, spend full time on this case, they can dispose of 600 claims per year assuming (optimistically), that each can fully hear two trials per day and handle all attendant matters (*e.g.*, review of the record, draft recommendations for disposition etc. in 1½ additional days). It is further estimated that, at the rates of compensation set by the District Judge, it will cost Western more than one million dollars in Special Masters' fees for each 1,000 claimants. Even if Western eventually prevails on appeal of the liability issues, it will have expended millions of dollars in Special Masters' fees which are, as a practical matter, not recoverable.*

* The District Judge has, by Order dated March 2, 1979, directed Western to pay the three Special Masters' fees on a quarterly basis.

The liability finding at Stage I of this case raises numerous and substantial issues. The District Judge denied Western's motion to disqualify him based on the appearance of impartiality created by an out-of-court conversation of his law clerk just two days after the start of trial. Kyriazi, Western contends, lacks standing to maintain this action, and is not a proper class representative under Fed.R.Civ.P. 23. The District Judge found liability back to the effective date of Title VII, July 2, 1965, although the EEOC charge in this case was not filed until 1972, and although statistical evidence introduced at trial went back only to 1967. He has ignored the concept of relevant labor pools in his opinion and has treated the class as a single mass in the face of Western's voluminous evidence "breaking down" the large workforce here involved into 600 different job classifications ranging from file clerk to physician, drill press operator to professional engineer. Of the seven employment practices found discriminatory, the District Judge made virtually no findings with respect to three: discharge, transfers into Kearny, and testing. He has found liability with respect to layoff, for example, in the face of uncontradicted testimony and documentation demonstrating that a *bona fide* seniority system was employed by Western.

The abrogation by the District Judge of his bifurcation Order has had the effect of shielding the liability findings in this case from review, while placing Western in the position of expending millions of dollars in nonrecoverable extraordinary costs at Stage II even if Western eventually prevails in this case.

4. Western has, pursuant to the District Judge's Order for payment of fees (which he refused to stay), already paid to plaintiff's counsel the sum of $280,834.49.* Attorney's fees and

* The District Judge has stayed (until further order) his direction that Western pay Stage II attorney's fees and costs to plaintiff's counsel on a quarterly basis. He has stated his intention, however, to proceed with determining the full amount of Stage I fees to which plaintiff's counsel is entitled, and has not stayed payment of those amounts.

APPENDIX A — PETITION FOR REHEARING AND FOR REHEARING IN BANC (Exhibits Not Included)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1380

WESTERN ELECTRIC COMPANY, INCORPORATED,

Defendant-Petitioner,

-vs-

HONORABLE HERBERT J. STERN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY,

Nominal Respondent,

KRYIAKI CLEO KYRIAZI,

Plaintiff-Respondent.

Western Electric Company, Incorporated, through its undersigned counsel, respectfully Petitions this Court for a rehearing and for rehearing in banc of its Petition for Writ of Mandamus and Prohibition which was denied by Order of this Court (Judges Aldisert and Higginbotham present) on April 25, 1979. That Petition had asked this Court to issue a Writ of Mandamus and Prohibition (1) directing the Honorable Herbert J. Stern, United States District Judge, United States District Court for the District of New Jersey to issue his opinion and order with respect to relief to be accorded the individual Plaintiff and plaintiff class in accordance with his Order of bifurcation filed October 14, 1975, (2) prohibiting him from

proceeding with the second phase ("Stage II") of this action as described in the aforementioned Order until he has decided the first phase ("Stage I") of the action under that Order, and (3) directing him to vacate his Order of February 27, 1979 requiring the payment of attorney's fees and costs to plaintiff's attorney and to require him to enter an order directing that said payments be returned to Western or, in the alternative, deposited with the Clerk of the District Court.

Procedural History:

Western filed its Petition for Writ of Mandamus and Prohibition along with supporting brief and appendix in this Court on March 27, 1979. On that same date Western also filed two separate motions for stays, one seeking a stay of the Stage II trial of individual cases in this Title VII, 42 U.S.C. §2000e et. seq. class action, and the other seeking a stay of the District Judge's award of $280,834.49 in attorney's fees and costs to plaintiff's attorney. Plaintiff filed a statement in opposition to Western's motions for stay.

By Order dated April 2, 1979 this Court directed plaintiff to answer Western's Petition within ten days, (a copy of the Order is annexed hereto as Exhibit A). By a separate Order of the same date this Court denied Western's motion for stay of Stage II trials, but granted Western's motion for stay of the award of attorney's fees and costs, (a copy of the Order is annexed hereto as Exhibit B). Plaintiff subsequently filed her Answer to Western's Petition with the Court.

In its Petition for Writ of Mandamus and Prohibition Western contended:

(1) it was substantially prejudiced by the District Judge's abrogation of his bifurcation Order of October 14, 1975 which

established the ground rules applicable to the trial of Stage I of this case. It is unassailable that Western had a right to rely on those ground rules in determining its approach to Stage I and that had the ground rules been changed prior to trial Western may well have altered its approach.[1] Indeed, plaintiff in her Answer to Western's Petition skirts this issue and does not (and could not) dispel the fact that Western had been prejudiced;

(2) the District Judge could have, and should have, entered at the very least a prohibitive injunction with respect to those employment practices of Western found to violate Title VII. Neither the District Judge nor plaintiff in her Answer to Western's Petition have even attempted to articulate a legitimate reason for this inaction. Indeed, plaintiff in her Answer concedes that a prohibitive injunction would be appropriate. The failure to enter such an injunction upon the finding of a liability has but one effect, to block the appeal clearly contemplated under the October 14, 1975 bifurcation Order;

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1. If it be assumed that this case could have been bifurcated differently prior to trial, *i.e.*, Stage I as to liability only, and Stage II as to all relief, the actual prejudice to Western which has in fact occurred here is not thereby dispelled. First, it was *not* bifurcated differently; to here assume facts that might have been but were not is to ignore the issue squarely raised by Western in its Petition to this Court. Second, even had the case been bifurcated differently, the Writ which Western sought should have issued; how can a district court after a finding of liability alone compel a defendant to finance his adversary's litigation costs? That liability finding is entitled to no more weight, prior to review by a circuit court, than is a district judge's ruling on any pretrial motion. Could the District Judge here have compelled Western to finance the litigation against it upon denial of Western's summary judgment motion or any other pretrial ruling? The answer, of course, must be "no", for it would constitute the taking of a defendant's property without due process of law. That is what has been done to Western in this case, and that fact would not have been altered even if this case had been bifurcated differently.

(3) the orderly administration of justice could not tolerate the posture of this case, *i.e.*, the large nonrecoverable expenditures forced upon Western prior to opportunity for appeal, and therefore, prior to a determination whether Western should in fact prevail in this case. Not even plaintiff in her Answer to Western's Petition could say more about this issue than that she expects to prevail on appeal;

(4) the award of attorney's fees and costs to plaintiff's attorney was beyond the power of the District Judge. Under applicable law plaintiff (not having been afforded any relief) was not a "prevailing party" as required under Title VII, and, as the District Judge flatly acknowledged, she had not complied with the requirements of this Court to establish a fee claim. In her Answer to Western's Petition on this point, plaintiff avoided direct confrontation with the legal issues raised by Western,[2] but

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2. *E.g.*, her discussion of the critical case of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) completely misses the issue raised by Western, *i.e.*, the proper meaning of the phrase "prevailing party", and her flat admission that her fee application failed to comply with applicable legal standards established by this Court.

Indeed, plaintiff's attorney flatly admitted that she could not provide a bond covering the more than $280,000 awarded to her, or any bond at all. Furthermore, the District Judge, while first recognizing that plaintiff's attorney had failed to even make out a fee application in conformity to the standards established by this Court, expressly based his award of fees on the ground that it was necessary to finance the litigation against Western. While this Court's stay of the counsel fee award was in effect, plaintiff's attorney conceded to the District Judge that she had already spent "most" of the money Western had paid her. Now that the stay has been vacated she seeks, and the District Judge has scheduled proceedings with respect to, the "remainder" of her Stage I fee claim of nearly one million dollars. Western has filed a notice of appeal on the fee issue.

asserted that Western's counsel had only contended before the District Judge that the fee issue was limited to the amount to be awarded plaintiff.[3]

On April 25, 1979 the Court, without oral argument, issued its Order denying the relief requested in Western's Petition and vacating the stay which had been previously granted with respect to attorney's fees and costs (a copy of the Order is annexed hereto as Exhibit C). No opinion accompanied that Order.

The Basis for this Petition:

Western submits that this Court has overlooked or misapprehended the basic thrust of its argument on its Petition; it has been denied fundamental due process by the District Judge. The present posture of this case requires Western to expend what will surely be several million dollars in nonrecoverable costs[4] in Stage II, while being denied the right to

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3. Plaintiff quotes Western's counsel during a February 22, 1979 status conference, but the attorney's fee issue was only raised at that conference in impromptu fashion by the District Judge. It was, in fact, at that conference that the District Judge directed Western to brief the question. On both February 27 and March 6, 1979, when the issue of attorney's fees was scheduled to be argued before the District Judge, Western's counsel clearly took the position that plaintiff's attorney was entitled to nothing and that "no interim fee should be paid at this point." March 6, 1979 Tr. p. 7, l.16. Plaintiff's Answer to Western's Petition on this point was plainly misleading.

4. These costs include the following expenditures: (a) quarterly payments to the three special masters appointed to hear Stage II cases at rates in excess of $100 per hour, (b) further payment to plaintiff's attorney of attorneys' fees and costs for the trial of Stage I under a schedule established by the District Judge at a May 2, 1979 status conference, (c) quarterly payments to plaintiff's attorney for attorney's fees and costs incurred during Stage II (see Order dated March 6, 1979, which is presently stayed until further order of the District

(Cont'd)

appeal the underlying findings upon which Stage II is predicated. This money and the efforts of scores of Western employees, hundreds of plaintiff class members, lawyers for plaintiff and defendant, special masters and others may be spent in vain should Western eventually prevail on appeal of this case. Western submits that it is antithetical to any concept of due process and a misuse of the judicial system to require a litigant to expend several million dollars in nonrecoverable costs, and years of effort in a proceeding which may, after appeal, prove to have been an act of futility for plaintiff class members as well as for the defendant. There is surely no authority supporting the orders of the District Judge which compel Western to finance Stage II of this case while the District Judge uses Stage II as a basis for determining Stage I relief. This course of action is particularly improper and prejudicial to Western in view of the ground rules established — but now violated — by the District Judge's bifurcation Order of 1975.

Indeed, the present posture of this case is a direct result of the District Judge's belated change of the ground rules[5] upon which the trial of Stage I took place.

(Cont'd)

Judge; see Order dated March 9, 1979), (d) the additional payment for a paralegal to be utilized by each special master if he so desires, April 26, 1979 Status Conference Tr., (e) the cost of providing all Stage II deposition and hearing transcripts to the special masters, (f) the payment of regular salaries to current Western employees who appear in Stage II trials advancing their own claims, and their witnesses who are current Western employees, (g) the cost (as yet undetermined, but obviously considerable) of placing Western's personnel records, approximately 60,000 of them, on computer as an "attendant" cost to the special masters' proceedings. May 2, 1979 Status Conference Tr.

5. The Order of October 14, 1975 provides:

> That the issues raised by the complaint herein shall be tried in two separate and independent stages, to wit, the issues of liability of the defendant Western Electric to the Class *and of class relief*, and of the liability of all defendants to the named plaintiff, Kyriaki Cleo Kyriazi, *and the relief* to which she may be entitled, shall be severed from the determination of the amount of back pay or other specific relief for individual members of the class; (Emphasis added).

Because the posture of this case confronting Western violated its sense of any notion of fundamental due process, Western, after settlement attempts[6] did not materialize, sought the intervention of the Third Circuit by way of its Petition for Writ of Mandamus and Prohibition. In declining to issue the Writ the Third Circuit has thus aligned itself with the proposition that the judicial system can, consistent with due process, tolerate the present posture. Western submits that the judicial system is not so inflexible as to preclude the granting of the Writ.

To be sure, the District Judge has given his reasons for changing the ground rules,[7] but these statements are not and should be not sufficient to preclude the granting of the Writ. One stated reason pertained to additional proofs required by the District Judge in regard to the class representative's individual case. The additional proofs were received at trial on May 1,

All involved understood that all proofs as to liability and relief save for individual awards, if any, to members of the class were to be heard and determined at Stage I. The question of class-wide relief was the subject of proposed findings of fact and briefs by all parties submitted at the close of Stage I.

6. Settlement discussions began on November 9, 1978.

7. The definitive statement of the District Judge's reasons was to be forthcoming in his opinion on Order denying Western's Rule 59 Motion to alter or amend the judgment. Western's proposed order on the motion, submitted on December 12, 1978, has not been entered by the District Judge.

1979. They consumed 68 pages of transcript (most of which pertains to discussion among the court and the attorneys) and certain updating of documents previously introduced at trial in 1977. The second stated reason pertained to additional proofs required by the District Judge in order to fashion injunctive relief.[8] The stated objective here is that from the trial of Stage II cases the District Judge would be in a better position to evaluate the extensiveness of the alleged discrimination. Even quite apart from the fact that (1) this posture violates the ground rules upon which Stage I was tried and (2) compels Western to finance part of Stage I, the stated posture of Stage II trials is not calculated to achieve the stated objective until virtually all of the Stage II cases are tried. This is so because (1) Western has been found liable with respect to several distinct kinds of discrimination and (2) the Stage II trials are proceeding on the basis of first claim filed, first tried. There is no way that this procedure can accomplish the stated objective in any expeditious manner.[9]

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8. See footnote 5 as to the Stage I ground rules which included the fashioning of injunctive relief. It is patently clear that a *prohibitive* injunction could have, and should have, been issued upon the finding of liability at Stage I.

9. Arguably a litigant may be required to go to Stage II at the same time an appeal from Stage I is pending. That possibility is inappropriate here because: an appeal from Stage I is not possible now, is not possible in the forseeable future because the District Judge has geared the completion of Stage I to findings which can only be made after extensive Stage II trials, and can only come after the expenditure of enormous sums of unrecoverable monies. This is not to say that at no point in these proceedings will there be a place for a special master. Here, however, Stage II is not an independent focus. Rather, Stage II has the effect of delaying Stage I. While that effect was not at first apparent, it is now abundantly clear that Western may have no right of appeal until Stage II is virtually completed.

Thus, even assuming that this Court were of the view that it was appropriate for the District Judge to "reopen" the record, the manner[10] utilized for that purpose is unduly harsh and does not comport with any notion of fundamental fairness.

Simply put, the "stated reasons" do not explain the pell mell rush[11] to Stage II trials, with all of its attendant consequences, prior to completing Stage I. On the other hand, the enormous consequences of Stage II, including its potentiality for being a wasted effort, do explain the need for immediate relief from the Third Circuit.

Counsel states that Western's Petition for Writ of Mandamus and Prohibition involves a question of exceptional importance, to wit: the denial to a defendant in a major Title VII class action of fundamental due process of law in violation of the Fifth Amendment. Western has previously set forth in its Petition the manner in which that denial has been effected.

There can be no question that if this Court is to permit the present posture to continue, the unmistakeable message to Title VII class action defendants is clear that the cost of defending themselves is, as a practical matter, prohibitive. To a Title VII class action defendant the message is as coercive as it is plain; since he faces risk of liability he must settle at an early stage of the proceedings because after a finding of liability, with the

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10. Moreover, since Western has not been advised of the specific additional proofs required by the District Judge to fashion injunctive relief, it is in no position to suggest a better way.

11. The District Judge has made it plain that he would not delay any aspect of Stage II proceedings based upon any consideration of completing Stage I.

defendant compelled to finance further litigation, there is no incentive, as a practical matter, for the plaintiff to effectuate settlement on other than his terms.

Western acknowledges the Congressional policy against employment discrimination announced in Title VII. But surely that policy does not permit a district judge to put a defendant in such a position that to prevail on appeal puts him in no better position than he would be in if he did not prevail on appeal.

Our system of federal jurisprudence is based, as it must be, on the assumption that all litigants will be accorded fundamental fairness before the courts. Where this assumption becomes reality, the system works well for all who come before the courts, but where, as here, that assumption is undermined by a district court, the appellate courts must safeguard the rights of litigants and the integrity of the judicial system itself through the use of any legitimate means available to them. The extraordinary writs of mandamus and prohibition are appropriate to achieve those ends; they should be utilized in this case to protect Western's Fifth Amendment due process rights. The posture which presently exists is plainly not correctable on appeal. There can be no question but that the District Judge has completely failed to even suggest a legitimate rationale for not issuing a *prohibitive* injunction against Western's employment practices which he found to be in violation of Title VII, that he has deliberately sought to shield his liability findings from review by this Court, and that he has further imposed enormous non-recoverable costs on Western in connection with Stage II of this case.

CONCLUSION

Western respectfully requests that its motion for rehearing and rehearing in banc be granted.

Respectfully submitted,

s/ S. Joseph Fortunato
S. JOSEPH FORTUNATO

s/ Edward P. Lynch
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DATED: May 9, 1979

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 30, 1978, AS AMENDED NOVEMBER 22, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, Inc., et al.,
Defendants.

Civil Action No. 475-73

October 30, 1978, as amended on November 22, 1978

STERN, J.:

I. INTRODUCTION AND SUMMARY OF COURT'S FINDINGS

This is a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The named plaintiff, Kyriaki Cleo Kyriazi ("Kyriazi"), charges defendant Western Electric Co. ("Western") with across-the-board sex-based discrimination with respect to virtually every condition of employment at its Kearny plant. Kyriazi also alleges that she herself was the victim of sex discrimination at Western in a number of respects. The issue of liability having been severed from that of damages, the case was tried on the liability issue alone commencing July 7, 1977 and concluding on December 1, 1977.

The Court, having heard the testimony at trial and having reviewed the voluminous exhibits submitted by the parties, finds that Western systematically denied women the employment opportunities it afforded men in the areas of hiring, promotion, and participation in training programs; that it slotted women initially into the lower-paying "women's jobs" and laid them off in disproportionate numbers in times of economic stress. This was proved through statistical evidence, never rebutted by the defendant, and through other evidence of purposeful discrimination.

In addition, the Court finds that Kyriazi is an adequate representative of the class, and that, as such, she may appropriately challenge Western's employment practices. Finally, the Court, having considered Kyriazi's individual case, finds that she was underrated, underpaid, and denied promotional opportunities by Western because of her sex; that she was harassed by her male co-workers; and that she was terminated on account of her sex and in retaliation for having lodged a complaint of sex discrimination.

II. PRELIMINARY ISSUES

A. Jurisdiction

The Court has jurisdiction over this action under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1343(1). Timely charges of discrimination were lodged with the New Jersey Department on Civil Rights and with the EEOC, which found reasonable cause to believe there was discrimination against Kyriazi and all women employed at Western's Kearny plant. (P-161). Pendent

jurisdiction exists over the tort claims against the individual defendants.[1]

B. Parties

Plaintiff Kyriazi was hired by Western in 1965 as a professional in the Information Systems (computer) field at Western's New York Headquarters. In February 1966 she was transferred into the Industrial Engineering organization at Western's Kearny plant. She was promoted to the position of Industrial Engineer in May 1967 and transferred in February 1969 into the Information Systems organization at Kearny. She was terminated by Western on November 19, 1971.

Kyriazi claims that (1) Western denied her promotions and gave her lower ratings and a lower salary than she deserved on account of her sex, in violation of 42 U.S.C. § 2000e-2(a); (2) that she was terminated by Western on account of her sex, in violation of 42 U.S.C. § 2000e-2(a); (3) that she was terminated by Western in retaliation for having filed formal charges against it, in violation of 42 U.S.C. § 2000e-3(a); (4) that Western and the five individual defendants conspired to deprive her of federally-protected rights, in violation of 42 U.S.C. § 1985(3); and (5) that the five individual defendants are liable under state law for having tortiously interfered with her employment at Western.

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1. *See, United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). There is subject matter jurisdiction over Kyriazi's state law claims because federal claims are also leveled against these same individuals under 42 U.S.C. §1985(3). *See Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976).

Defendant Western, an "employer" within the meaning of 42 U.S.C. § 2000e(b), is engaged in the manufacture of telephone equipment. Western's Kearny Works Organization consists of a main facility, the Kearny plant, and a satellite location, the Clark Shops. The main facility manufactures exchange area and video pair cable, key equipment, PBX's switchboards, amplifiers for underseas cable and transmission apparatus for the Bell System (Exhibit P-77; Introduction). The Clark Shops manufacture submarine cable repeaters for the United States Government (Exhibit P-77) and for the telephone company (Malina, 43: 5335-6) (Hobbie, Tr. 197).

The five named individual defendants are Fred Wilser, Kyriazi's supervisor during her tenure at the Information Systems department in Kearny; Ralph Boyd, who supervised a department of the Information Systems professionals during the period in which Kyriazi was physically located there; and Kyriazi's male co-workers in Information Systems: James Snyder, Robert Armstrong and Shen T. Liu.

C. Scope of Class and Class Claims

By order dated July 16, 1975, the Court certified the class to encompass:

> all females who are now or at any time since June 9, 1971, have been employed by defendant Western Electric Company, or who sought employment with said Company during the pendency of this suit, at the Kearny works organization.

On behalf of this class, Kyriazi contends that women have been discriminated against in the areas of (1) Hiring, (2) Promotion, (3) Transfer, (4) Layoff, (5) Discharge, (6) Maternity Leave, (7) Tuition refund benefits, (8) Participation in the Bell Systems Savings Plan, (9) Participation in training programs, and (10) Opportunities for testing.

D. Kyriazi's EEOC Charge and its Effect on Class Membership

As a prerequisite to suit under Title VII, timely charges must be filed with both the state agency and with the EEOC. 42 U.S.C. § 2000e-5(e). Where a named plaintiff in a class action has complied with these requirements, he or she may represent a class composed of all those who could have filed charges of discrimination as of the date on which the named plaintiff filed her charge. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3rd Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

Kyriazi filed two charges of discrimination with the EEOC; an unsworn charge dated January 7, 1972 (P-161) and a sworn charge dated September 11, 1972 (D-79B).[2] Western argues that

2. The text of both charges is identical. It reads:

> "DEGREES: (1) MS. GRAD. SCHOOL OF ENGINEERING (2) M.B.A. GRADUAT. SCHOOL OF BUSINESS BOTH OF COLUMBIA UNIV. SERVICE: HIRED AS AN ENGINEER IN 1965, TOTAL SERVICE 7 YEARS (1965-NOV. 1971) PERFORMANCE: THEORETICAL & PRACTICAL APPLICATIONS EXCELLENT, RELATIONSHIP WITH 99.999% OF THE

(Cont'd)

the Court should credit only the latter charge, thus limiting class membership to all women who could have filed charges as of November 15, 1971, that is, 300 days before September 11, 1972.[3]

The Court, in accordance with its earlier order certifying the class, credits Kyriazi's first charge with the EEOC filed January

(Cont'd)

> CO. EXCELLENT TILL TODAY, THE 5 YEARS OUT OF THE TOTAL 7 (APPROX.) MUTUAL RESPECT COMPLAINTS:
>
> UPON TRANSFER TO A NEW ORGANIZATION AT APPROX. THE 5TH YEAR OF SERVICE I FACED EXTREME CALCULATED (SEX) DISCRIMINATORY PRACTICES, 1. PROFESSIONALLY: IN THE ASSIGNMENT OF WORK (PROJECTS ME TO DEVELOP), APPLICATION OF UNETHICAL PROFESSIONAL PRACTICES AND REFUSAL OF COOPERATION COMPLETELY IGNORING MY INTERESTS IN RATING, SALARY INCREASES AND PROMOTIONS, RESULT: FINANCIAL LOSS HUMILIATION AND LOST OPPORTUNITIES FOR PROMOTION TO SENIOR ENGINEER. 2. PERSONALLY: HARASSMENT, REACHING PROPORTIONS OF IMMORALITY, GENERALLY CALCULATED ADTION [sic] TO ALTER (TO THE WORST) MY EXCELLENT PROFESSIONAL AND PERSONAL IMAGE IN THE CO. REPRISAL: WHEN THEY WERE INFORMED THAT I FILED A SUIT AGAINST THE CO. (WITH THE N.J. STATE), THEY TERMINATED MY EMPLOYMENT. . . .

3. Prior to March 24, 1972, and pursuant to 42 U.S.C. §2000e-5(d) an individual in a state which had enacted anti-discrimination laws had a period of 210 days (as opposed to 90 days in states without such laws) to file charges of discrimination with the EEOC. Effective March 24, 1972, this period was extended to 300 days.

7, 1972, thereby allowing her to represent a class of women who had viable claims of discrimination within 210 days of that date, or June 9, 1971. For it is by now well-settled law that unsworn, unserved charges are effective on the date filed. *See, e.g., Georgia Power Co. v. EEOC,* 412 F.2d 462 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.,* 402 F.2d 357 (7th Cir. 1968). In balancing the possible prejudice to each side, we find that selection of the earlier date affects only the measure of defendant's damages—not its liability—while selection of the latter date would preclude relief to women who were deliberately denied their federally-guaranteed right to equal employment opportunities. Accordingly, the Court adheres to its order certifying the class and holds that the class consists of all women who had viable claims of discrimination as of June 9, 1971.

Western argues further that the class claims should be limited to those asserted by Kyriazi in her EEOC charge. (Def's Pr. Finding No. 25). It is clear, however, that a Title VII named plaintiff may raise not only his or her own claims, but also those "growing out of such allegations during the pendency of the case before the Commission." *King v. Georgia Power Co.,* 295 F.Supp. 943, 947 (N.D.Ga. 1968). *See also, e.g., EEOC v. General Electric,* 532 F.2d 359, 368-9 (4th Cir. 1976); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

E. Actionable Period

We next address the question of the time period for which Western may be held liable. Western argues that it may be held liable only for those acts of discrimination which occurred within the 210 days before Kyriazi filed her charge with the EEOC, and that claims arising prior to that date are time-barred. Plaintiff argues that while class membership is governed

by this date, class members may secure remedies for acts of discrimination occurring back to July 2, 1965 (the effective date of Title VII) or the date of their hire, whichever is later, because Western has engaged in a "continuing violation" of Title VII.

The "continuing violation" theory permits a Title VII plaintiff to challenge an employment practice even if all the acts of discrimination alleged did not occur within the EEOC filing period. This is so because where an employer has regularly and systematically discriminated against a class it will often be impossible to isolate specific acts of discrimination occurring within the filing period. *See generally,* Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law,* 884-908 (1976). This theory serves a number of different purposes; for example, it permits a plaintiff to challenge a practice without the necessity of alleging that he or she is presently affected by it, *see e.g., Bartmess v. Drewrys USA Inc.,* 444 F.2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939, 92 S.Ct. 274, 30 L.Ed.2d 252 (1971) (female employee challenging system which forced women to retire earlier than men did not have to await her own retirement to file EEOC charge); *Wetzel v. Liberty Mutual, supra* (system of segregating females into certain jobs may be challenged at any time). It also permits a Title VII plaintiff to seek redress for acts of discrimination occurring *prior* to the EEOC filing period, for, as the Court of Appeals for the Tenth Circuit has noted, the short EEOC filing period "looms inconsequential" in the face of a practice which regularly discriminates against a class. *Rich v. Martin Marietta Corp.,* 522 F.2d 333, 348 (10th Cir. 1975). *See also, Kohn v. Royall, Koegel & Wells,* 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed,* 496 F.2d 1094 (2nd Cir. 1974) (charge timely even though no applications made within 180 day filing period).

Defendant argues that the Supreme Court's recent decision in *Evans v. United Airlines*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) abrogates the "continuing violation" theory. We disagree.

In *Evans*, the plaintiff had been forced to resign in 1968 from her position as a stewardess because of her employer's *then* prevailing no-marriage policy. That policy had been eliminated when the plaintiff resumed her employment in 1972. More than a year later she challenged her lessened seniority which, she contended, was the direct result of the discriminatory policy which prevailed in 1968. The Court held that since she did not make a timely charge in 1968, she could not now challenge the practice because at present she suffered no more than the present effects of past discrimination.

It is clear to this Court that *Evans* does not overrule the "continuing violation" theory of Title VII. For, as the Supreme Court was careful to point out in *Evans*, the only employment practice which presently existed was the seniority system, which, while it had an adverse impact on the plaintiff to the extent that it perpetrated the effects of *past* discrimination, was itself non-discriminatory. Thus, no *present* continuing violation existed:

> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.

Id., at 558, 97 S.Ct. at 1889 (Emphasis in original). Here, by

contrast, we deal with an employment practice which *did* constitute a violation of Title VII *as of the time the EEOC charges were filed.*[4]

Accordingly, because plaintiff has alleged and proved a "continuing violation" of Title VII as of the time the EEOC charges were filed, any woman who had a claim against Western as of June 9, 1971 may secure relief for acts of discrimination which occurred from July 2, 1965, the effective date of Title VII, to the present.

Kyriazi's claims against Western and the five individual defendants under 42 U.S.C. § 1985(3) will be governed by New Jersey's six year statute of limitations applicable to actions for breach of contract and injury to property. N.J.S.A. 2A:14-1, *see, Davis v. United States Steel Supply*, 581 F.2d 335 (3rd Cir., 1978), as will Kyriazi's tort claims against the five individual defendants.

III. SUMMARY OF PLAINTIFF'S PRIMA FACIE CASE

It is by now axiomatic that a Title VII plaintiff has the initial burden of offering evidence adequate to create an inference that the employer has engaged in a pattern and practice of discrimination directed at the class. In a "disparate

4. We are bolstered in our view that *Evans* did not overrule the "continuing violation" theory of Title VII by the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), decided the same day as *Evans*. In that case, although the Court did not specifically address the "continuing violation" theory, it did approve the award of retroactive seniority back to the effective date of Title VII to class members who were denied the right to transfer to the position of "line driver".

treatment" case, the plaintiff must show—if only through circumstantial evidence—a discriminatory motive or intent on the part of the employer; in a "disparate impact" case, the plaintiff must show that facially neutral practices, while "fair in form" are "discriminatory in operation."[5] Once this initial burden is discharged, the burden then shifts to the employer to provide a non-discriminatory explanation for its practices. *See, International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See generally,* Schlei & Grossman, *supra,* at 1147-96; George Cooper. Harriet Rabb & Howard Rubin, *Fair Employment Litigation,* 64-130 (1975).

The Supreme Court has recently made clear that a *prima facie* case may be made on statistics alone, albeit that the reliability of those statistics depends on all the surrounding facts and circumstances. *See, Teamsters, supra,* at 339-340.

Here we are satisfied that plaintiff has met her burden based on statistics alone. She has shown through statistical evidence, discussed more fully hereafter, (1) that women are disproportionately clustered into the lowest graded jobs at Western; (2) that women are hired initially in disproportionate numbers into the lowest grades; (3) that women are promoted in fewer numbers and with less frequency than men; (4) that women are completely foreclosed from participating in job programs which would help them ascend from the low ranks; and (5) that women were laid off in far greater numbers than men.

5. While plaintiff has not clearly elected the theory under which she proceeds, the Court characterizes this action as a "disparate treatment" case.

This is not, however, merely a "statistical" case. In addition to an overwhelming amount of highly relevant statistical evidence, itself sufficient to sustain her burden, plaintiff has brought these statistics to life with direct evidence that supervisors on every level at Western intentionally discriminated against women on a plant-wide basis. This evidence includes the use of discriminatory advertising for hire and personnel requisition forms which permitted Western's supervisors to designate their sex preference for a position. Such evidence of discriminatory purpose removes any question that the statistical disparities proved by the plaintiff arose merely as a matter of chance.

We turn first to plaintiff's statistical case.

IV. DISTRIBUTION OF MEN AND WOMEN WITHIN WESTERN'S WORKFORCE AT KEARNY

Women have comprised between 33 and 39% of Western's workforce during the relevant period. Nevertheless, as plaintiff's statistical proofs reveal, females are virtually excluded from the highest level positions while they swell the ranks of the lowest clerical and operative grades. Thus, for example, plaintiff's proofs demonstrate that as of January 1, 1975:

1. There were 735 employees within the EEO category denominated "Officers and Managers", which encompasses supervisory positions at Western.[6] Only 1.9% of this group was female. Even within that small percentage, no women held a

6. Personnel at Kearny are divided for EEO purposes into six broad categories: (1) Officials and Managers; (2) Professionals; (3) Technicals; (4) Skilled Crafts; (5) Clericals, and (6) Operatives.

position above that of section chief, the lowest level of supervision. (Hobbie, 2:230; Exhibits P-77; P-11; D-204, Tab 1974).

2. There were 545 employees within the "Professional" category, which includes such diverse occupations as Engineer and Information Systems Staff member. 93.2% of this group was male. The female professionals who made up the remaining 6.8% included secretaries and nurses. (Exhibits P-77; P-11; D-204, Tab 1975).

3. There were 426 employees within the "Technical" category, which includes the positions of Engineering Associate, Information Associate and lab technician. 97.7% of this group was male. (Exhibits P-77, D-204; Hobbie, 2:234).

4. There were 1946 employees within the Office and Clerical category, 66% of whom were women. There were 6283 employees in the Operative category "30" series, 46.6% of whom were women, and there were 456 employees in the Operative-Laboratory Technician "600" series, 94.7% of whom were female. Within those percentages we find women clustered primarily in the lowest grades of each category of employees: (Plaintiff's Proposed Findings of Fact, 11 a, b, c).

a) The Clerical category is divided into the "200" and the "500" series. The "200" series is graded from grade 202 to grade 212; grades within the "500" series run from grade 503 to grade 512. The distribution of men and women was as follows:

200 SERIES		500 SERIES	
Grade	% Female	Grade	% Female
202	81	503	100
203	92.7	504	100
204	95.4	505	100
205	83.1	506	94
206	82.3	507	86
207	75.8	508	57
208	59.6	509	50
209	34.7	510	40
210	39.1	511	25
211	21.9	512	10
212	8.9		

(Exhibits P-77; P-20) (Exhibit P-28)

b) The "operative" category encompasses jobs which deal directly with the manufacturing process, such as assembler and drill press operator. This category is divided into the "30" series, running from grade 32 to grade 39, and the "600" series (covering laboratory technicians in the Clark Shops) which runs from grade 611 to grade 691. The distribution of men and women within these grades was as follows:

30 Series

GRADE	NO. IN GRADE	% FEMALES IN GRADE
32	1,974	90.0
33	1,108	62.0
34	1,303	28.0
35	891	8.0
36	700	1.3
37	305	1.6

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(Exhibits P-22; P-77) (January 1, 1975)

600 Series

GRADE	NO. IN GRADE	% FEMALES IN GRADE
611	18	89
621	56	100
631	113	46
641	85	68
651	55	58
661	73	13
671	40	08
681	5	00
691	11	00

(Exhibit P-23) (January 1, 1975)

c) In addition, plaintiff's proofs suggest that so-called "female jobs" are graded more strictly than so-called "male jobs":

"MALE JOBS"	"FEMALE JOBS"
Draftsman (Grade 203) (47 males and 2 females hired between 1967 and 1976.) (P-74)	Clerk Typist (Grade 203) (133 females and no males) (P-74)

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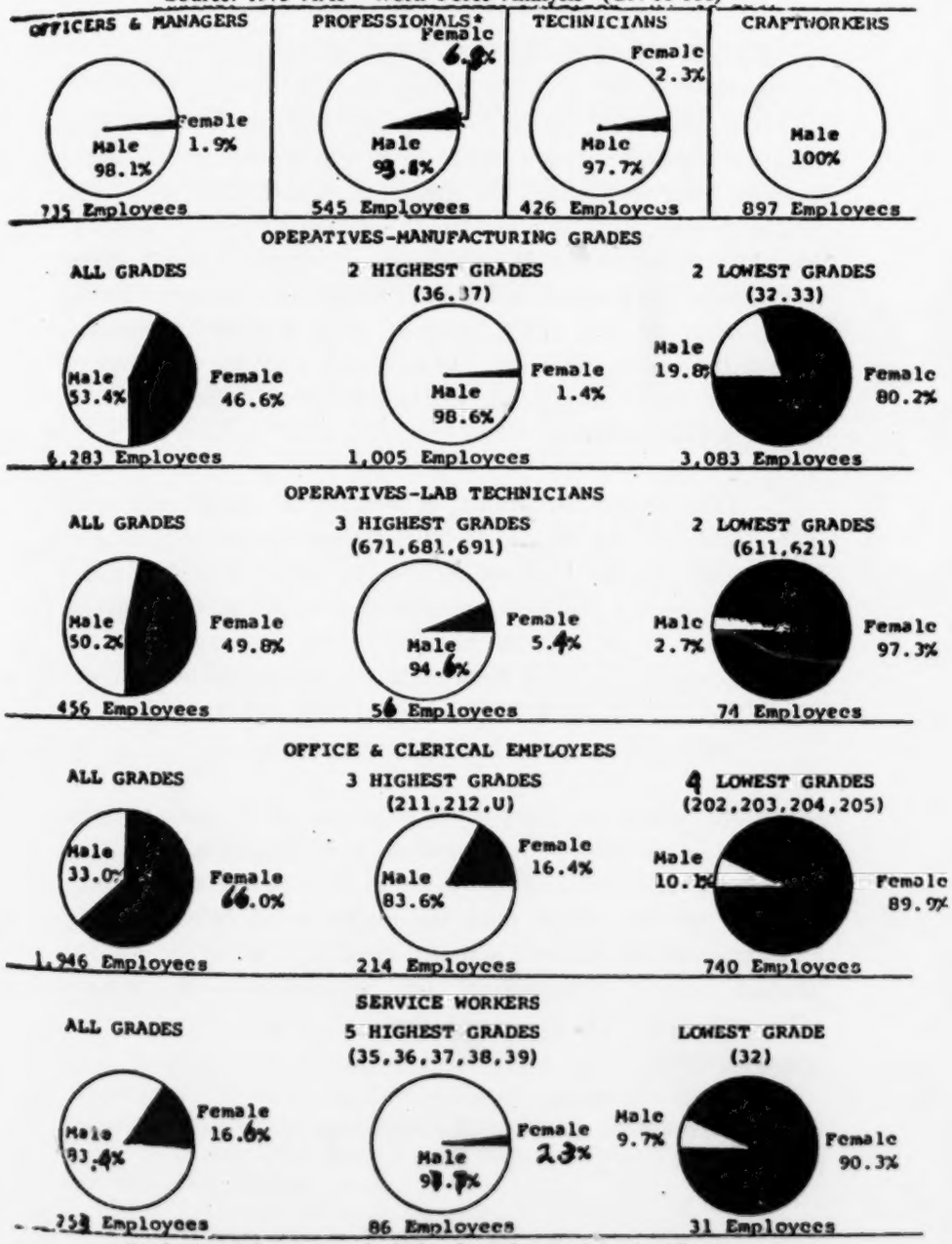
Job Prerequisites:	Job Prerequisites:
No prior experience — ¾ of 4 month mechanical training course. (D-175(a),(b))	Requires 2 months or 4 months prior experience *and* typing skills. (D-175(a),(b))
	Other grade 203 level jobs into which only females are hired (teletype operators calculating machine operator) require prior experience. (D-175(a),(b))
———	———
Staff Chauffeur (Grade 508) (filled only by males between 1967 and 1976) (D-204) (Exh. D-177).	Telephone Overseer (Grade 508) (Filled exclusively by females) (D-204) (Exh. D-177).
Job Responsibility:	Job Responsibility:
No responsibility for work of others. Must "[o]perate limousines, passenger cars and station wagons to provide transportation for company executives . . . and keep limousines clean."	Supervisory in nature; trains and supervises operators; maintains directory and information files.
	Assistant Telephone Overseer (Grade 507) (exclusively female) must: "oversee and

> coordinate all operating activities of the Works Telephone Exchange ... assign work schedules, instruct telephone personnel, recommend revisions and improvements for optimum service and savings, handle incidents of urgent or critical natures such as crank calls or bomb threats requiring extensive reasoning to ascertain between valid or invalid emergencies, etc. Reports must be maintained and/or compiled on a wide variety of topics including special studies and summaries relating to telephone service operational activities with associated comparisons and analyses."

5. The skewed distribution of women into the lowest grades and occupations at Western is given visual dimension in the following graphs:

1975 WORK FORCE COMPOSITION BY SEX AND JOB CATEGORY

Source: 1975 AAP "Work Force Analysis" (GN-11-166)



"Professionals" category includes 2 all-female job classifications: nurses (11 employees) and executive secretaries (7 employees)

V. HIRING PRACTICES AT WESTERN

It is Western's policy to promote from within. Thus, the bulk of Western's hiring is done at the lowest levels, while higher-graded positions are filled almost exclusively from Western's own work-force. (Vines, 11: 1100-11; Hobbie, 2: 340-1, 44: 5368). Nevertheless, Western argues that plaintiff has failed to delineate the relevant labor pool, both for purposes of hiring and promotion. It is clear, however, given Western's promote-from-within policy, that the relevant labor pool for purposes of promotion is Western's own workforce. *See,* Cooper, Rabb & Rubin, *supra,* at 84-5:

> [There] are situations in which the employer's own conduct can be said to have defined the labor pool. For example, in choosing persons for higher level jobs many employers follow a practice of promoting from within, and the pool of persons in entry level jobs is the pool for promotion . . . [W]here there are substantial percentages [of minorities] in the entry level pool and many fewer at upper levels, there is a statistical disparity.

Moreover, since the entry level positions at Western require virtually no qualifications, and since it is plaintiff's claim that women are initially hired into lower grades than men, it is clear that the relevant labor pool for purposes of hiring are the employees whom Western actually hired. *Cf., Wetzel v. Liberty Mutual, supra,* (comparing sex composition of "claims adjusters" and "claims representatives" which have similar requirements.)

We turn now to plaintiff's statistics on Western's hiring practices.

Grade 32 and 33 jobs have no requirements of skill, education or experience.[7] (Exhibit P-15). Nevertheless, during the period from 1967-1976, of a total of 1,664 men and 2,103 women hired for grade 32 or 33 positions, *97.5% of the women were hired at grade 32 while only 47% of the men were hired at grade 32.* (Exhibit P-14). In operative jobs requiring no prior experience, virtually all the women were hired into grade 32, while in many of the job categories, grade 33 hires were exclusively men:

HIRING FOR JOBS WITH OPERATIVES AT BOTH GRADES 32 AND 33 WHERE NO EXPERIENCE IS NECESSARY, 1967-1976

JOB	GRADE	MEN HIRED	%	WOMEN HIRED	%
Selector	32	17	94.5	2	100
	33	1	5.5	0	0
Bench Hand	32	174	93.5	490	100
	33	12	6.5	0	0
Cleaner					
	33	331	100.0	0	0

7. There are, however, significant differences between these two grades in terms of salary, promotion and, most importantly, layoff. As will be discussed in greater detail *infra,* the collective bargaining agreements in effect during the relevant period provided for layoffs *by grade,* so that, for example, a grade 32 worker with twenty years seniority would be laid off before a grade 33 worker with two years seniority.

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HIRING FOR JOBS WITH OPERATIVES AT BOTH GRADES 32 AND 33 WHERE NO EXPERIENCE IS NECESSARY, 1967-1976—Continued

JOB	GRADE	MEN HIRED	%	WOMEN HIRED	%
Inspector	32	7	17.0	24	58.5
	33	35	83.0	17	41.5
Process Checker	32	8	73.0	41	100
	33	3	27.0	0	0
Floor Hand	32	11	65.0	0	0
	33	6	35.0	0	0
Assembler	32	197	90.0	487	99.4
	33	21	10.0	3	.6
Tester	32	7	64.0	9	90.0
	33	4	36	1	10.0
Totals	32	422	50.5%	1,053	98%
	33	413	49.5%	21	2%

(Exhibit P-15, covering 1967-1976 period.)

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Grade 32, the lowest grade for operatives, and grades 202 and 203, the lowest grades for clericals, are the three lowest grades at Western. (Exhibit P-12). 84.9% of all women hired by Western between January 1967 and April 1976 were placed in one of these three grades. (Exhibit P-45). More specifically, of the 3,755 women hired by Western during this time period:

—55.7% were hired at Grade 32

—27.0% were hired at Grades 202 or 203

—6.7% were hired at Grade A01 (Newark Shop Trainee)

—2.1% were hired at Grade 503

(Exhibit P-45). In sharp contrast, *only 27.5% of the men hired by Western during the same time period were hired into the three lowest grades,*

—17.3% were hired at Grade 32

—10.2% were hired at Grades 202 or 203 (Exhibit P-45).

This sex-segregation of jobs is dramatically summed up by the following statistic: *For the period 1967-1976, there were 141 jobs at Western into which only males were hired and 47 jobs into which only females were hired.* (Exhibits P-16, P-46).

Finally although Western rarely fills its higher-graded positions through hire, when it does so, it awards them almost exclusively to men:

Group	No. of Males Hired	No. of Females Hired
Clerical (grade 208/508 or above)	54	8
Clark Shops Laboratory Technician (above grade 631)	55	0
Engineering Associates	167	4
Occupational Engineers	12	1
Senior Engineers	3	0
Information Systems Staff Members	72	15
ANSE—II category	15	2

(Exhibit P-74, covering period from 1967-1976)

VI. PROMOTION PRACTICES AT WESTERN

As noted earlier, employees hired into the lowest entry jobs can advance by promotion or upgrade to the highest level jobs at Western, that is Western's policy. Thus, an employee hired as a grade 32 operative can progress not only to the highest operative grade, but also to a position in management, or in the professional, technical or craft levels. Indeed, the Court was struck by the fact that many of Western's employees who testified at trial had themselves been promoted from shop or

clerical grades to professional or management levels. (Bridges, 16: 1635-9; Kubicki, 15: 1530-33; Marca, 27: 3317-18; Day, 46: 5617; Murath, 16: 1715).

We begin with a labor pool which, as we have already held, is composed of Western's own workforce. During the relevant period between 33 and 39% of this pool was female. However, as plaintiff's statistics demonstrate, that portion of the workforce remained primarily in the lowest positions within each job category and department, while promotional opportunities at each step of the ladder, from the lowest rungs to the steps within supervision itself, were afforded almost exclusively to the favored 61 to 67% of the workforce population.

Thus, for example, within the Officials and Managers category, which encompasses Western's supervisory personnel, no woman has ever been promoted above the lowest level, that of section chief. Indeed, no woman has ever held a position above that level, whether by promotion or otherwise. Men have held such positions in large numbers: between 96 and 220 in the position of department chief, the second lowest position; between 36 and 85 in the three highest supervisory positions of assistant manager, director and general manager. (Exhibits D-204, 1967-76).

To the extent that women have been promoted to the position of section chief, this has been done in small numbers. Thus, during the 1967-76 period, the number of male as compared to female section chiefs was as follows:

Year	No. Male Section Chiefs	No. Female Section Chiefs	% Section Chiefs Who Were Female
1967	642	9	1.38
1968	639	8	1.23
1969	655	8	1.20
1970	612	10	1.60
1971	599	10	1.64
1972	544	10	1.77
1973	530	13	2.39
1974	501	13	2.80
1975	485	14	2.80
1976	325	9	2.49

(Exhibit P-29). (See also Hobbie, 6: 374-5).

Moreover, the evidence demonstrates that even when women were permitted to hold the position of section chief, they were given responsibility over stereotypically "female work" and almost exclusively over female populations. (*See, e.g.,* Yesko, 43: 5312; Smith, 43: 5296-7).

It is not surprising that women have been virtually excluded from supervisory positions. It is the incumbents of such positions who do the selection, and they are instructed to look for candidates who "did a good job" who could "handle people and handle new situations" and who "did not require a lot of instruction." (Vines, 14: 1396). The use of such vague criteria by supervisors who, as we shall discuss, *infra,* almost invariably expressed a personal preference for men in completing their personnel requisition forms, again breathes life into plaintiff's statistics and demonstrates the discriminatory manner in which these criteria were applied.

Similarly, within the Operative, Service Worker and Graded Craft categories, as was shown above, women are clustered within the lowest grades. Despite the large number of women within the promotion pool, an examination of actual promotions during the 1973-6 period reveals that few women were promoted to grades 34 or above and that *no* women were promoted to grade 37 or above:

PROMOTION AND AVAILABILITY OPERATIVES, SERVICE WORKERS AND GRADED CRAFTS

Date	# Males Promoted to Grade	# Females Promoted to Grade	% Promotions to Grade going to Females	% Females in Feeder Grade (12/4/72)
1/1-12/31/73				
Promoted to Grade				
33	107	120	53	91.2
34	159	33	17	55.7
35	128	9	7	22.0
36	78	1	1	7.5
37	61	1	2	1.3
38	17	0	0	2.1
39	4	0	0	0.8

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PROMOTION AND AVAILABILITY OPERATIVES, SERVICE WORKERS AND GRADED CRAFTS

Date	# Males Promoted to Grade	# Females Promoted to Grade	% Promotions to Grade going to Females	% Females in Feeder Grade
1/1-12/31/74				(1/6/74)
Promoted to Grade				
33	49	116	70.3	91.9
34	76	49	39.2	55.2
35	68	9	11.6	23.5
36	59	0	0	6.6
37	61	0	0	1.3
38	15	0	0	1.8
39	3	0	0	0.8
1/1/75 - 12/31/75				(12/2/74)
Promoted to Grade				
33	16	13	44.8	90
34	65	4	5.7	57.8
35	61	0	0	26.4
36	26	1	3.7	8.0
37	6	0	0	1.4
38	3	0	0	1.6
39	1	0	0	0

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PROMOTION AND AVAILABILITY OPERATIVES, SERVICE WORKERS AND GRADED CRAFTS

Date	# Males Promoted to Grade	# Females Promoted to Grade	% Promotions to Grade going to Females	% Females in Feeder Grade
1/1/76-12/31/76				(12/1/75)
Promoted to Grade				
33	63	80	55.9	68.9
34	91	57	38.5	53.3
35	45	1	2.1	24.4
36	38	3	7.3	7.7
37	32	1	3.0	0.5
38	7	0	0	1.2
39	1	0	0	0

(Exhibits D-191, 204, 238)

This disparity is not explained by seniority, by job qualifications or by occupation. Plaintiff's exhibits 217-222 show that for the years 1974, 1975 and 1976, females in each grade had substantially greater seniority than males in each grade. The job specifications for the higher-graded positions reveal that the only skills, knowledge or experience required are attainable through experience in Western's lower graded jobs. Moreover, even within the so-called "women's occupations", positions within the higher grades are filled primarily by men. (Exhibits D-204; P-77; P-83). Thus, women do not even progress within the occupations into which they have been segregated.

The same pattern exists within the Clerical category. As of January 30, 1975, in both the "200" and "500" series, women at each grade had between two and ten years greater seniority than men. (Exhibits P-27, P-28).

"200" Series

Grade	Years Greater Seniority of Females
204	1.85
205	5.06
206	5.90
207	7.07
208	2.83
209	9.21
210	3.97
211	7.08
212	10.08

(P-27, P-28).

"500" Series

Grade	Years Greater Seniority of Females
503	2.69
504	6.36
505	5.99
506	4.32
507	9.60
508	6.03
509	10.03
510	8.19
511	6.50
512	8.01

(P-28(b))

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The same is true within the remaining job categories at Western. For example, between 1972 and 1975, within the Technical category, 5 males were promoted to the position of Information Associate; no women were promoted to this position. During this same period, 14 males and only 1 female were promoted to the position of Engineering Associate. (Exhibit P-74). During these same years, within the Professional category there were 27 promotions within the ANSE (Administrative Non-Supervisor Employee) position. Only 14.8% of these promotions went to women. It was not until 1977 that a female was promoted to an ANSE-3 job (Exhibit D-204) and, to date, no woman has held an ANSE-4 job, whether by hire, promotion or transfer. (Exhibits D-204; P-74). Moreover, those women within the ANSE category have been clustered into ANSE-1 positions from which no promotion is possible, in jobs such as Pioneer Representative, Dietician. (Exhibits D-204; P-91(a)). Similarly, during this same period, 5 males and no females were promoted to Senior Information Systems Staff member; 22 males and 7 females were promoted to Information Systems Staff member. (Exhibit P-74).[8]

VII. PARTICIPATION IN TRAINING PROGRAMS AT WESTERN

Training programs have a great impact at Western. Having heard the testimony of nearly two score of Western's former and present supervisors, and having studied their employment histories, the Court was struck by the fact that nearly all of them rose from what are generally considered "blue collar" jobs to important supervisory positions in fields unrelated to those into which they were first hired.

8. Also within the Professional category is the position of Engineer which will be discussed *infra* in connection with Kyriazi's individual case.

Western has operated two programs to train individuals for jobs in supervision: the Shop Staff Training Program and a program which hires staff trainees.

The Shop Staff Training Program trains individuals with shop backgrounds for positions as section chiefs. (Vines, 13: 1372; 15: 1492; Exhibit D-211). During the years 1964, 1965, 1966, 1970, 1973 and 1975, only 4 females participated in this program as compared to 64 males. (Exhibit P-30). It was not until 1970 that a female participated in this program at all. Although the pool from which these trainees are drawn is the operative classifications, females within this pool were largely ignored even after 1970:

Year	Percentage of Women Within Operative Classifications	Percentage of Women Trainees
1970	42%	5%
1973	46%	8%
1974	47%	16%

(Exhibits P-30; P-76, Tab 6; P-77, Tab 5; D-204, Tab 1970).

The second program which trains individuals to become section chiefs draws from new employees hired into the classification denominated ANSE-I Staff Trainee. (Vines, 14: 1400; 15: 1492; Exhibit P-91(a); P-18). During the period from 1967 through 1976, no female was ever hired into this classification while 58 males were hired. (Vines, 14: 1400; Exhibit P-74). Western has failed to explain this disparity.

Western also operates a training program for technical-professional employees at its Corporate Education Center in

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Princeton. (Kubicki, 15: 1566). Female professionals who were selected to participate in this program were encouraged to take courses in such non-technical areas as "Creative Thinking", which could not lead to any substantial career advancement. (Exhibit D-211).

Western has also operated two programs designed to train individuals in skilled crafts: the Apprenticeship Training Program and the Plant Trades Training Program. In order to be eligible for entry into these programs, a candidate had to have a working knowledge of a particular craft. Western has produced evidence that the pool from which it draws participants in these programs consists of vocational school graduates, who are almost exclusively males. (Schmaydey, 42: 5166; Vines, 14: 1497; Killman 42: 5173). Accordingly, with respect to these two programs, the Court finds that the failure to select women was not the result of discrimination.

VIII. LAYOFFS

The Kearny workforce has been declining over the past ten years. In 1968, there were 14,502 employees; in 1970, there were 13,000 employees; in 1976, there were 8,000 employees and by May, 1977, Western's workforce was reduced to 7,133 employees. (Exhibit D-204). Of the approximately 5,284 employees whom Western laid off between 1970 and 1976, 63% were women while only 37% were male. (Vines, 13: 1349-50, 1553; Exhibit P-17). An examination of the procedures governing layoffs sheds light on this disparity.

The collective bargaining agreement in effect prior to August, 1974 ("the 1971 Agreement") provided, in essence, that individuals would be laid off by occupation and grade, in inverse order of seniority. Thus, under this system, the line supervisor

would declare a surplus, and the surplus would then be pegged to an occupation, grade level and department chief's organization. (Vines, 15: 1518; Grider, 54: 5542-3). The individual with the least seniority within that occupation, grade level and department chief's organization was the one laid off. However, management retained complete discretion *not* to lay an individual off. (Vines, 14: 1424-5).

If management chose to retain a surplus employee, they had the option to either transfer him laterally if there was a vacancy within his grade level, or, if that proved unsuccessful, to "bump" him down. (Grider, 45: 5513-5).

The "bumping" process worked essentially as follows. An employee may bump down only within his own occupation, but, even then, he may not bump an employee with greater seniority. Thus, for example, if a surplus were declared at the level of grade 34 benchman, the individual within that grade with the least seniority would either be laid off, or if management so chose, he would "bump" a grade 33 benchman with less seniority.

While seniority was a factor in the "bumping down" process, there was no such thing as "bumping up". (Vines, 15: 1515). Thus, if a surplus were declared at grade 32, a grade 32 worker with twenty years seniority could be laid off even if there were a grade 33 worker within that occupation with only two years seniority.

Effective August 1974, Western entered into a new collective bargaining agreement with Local 1470, covering

operatives, service workers, "200" clericals and crafts.[9] Under that agreement, employees in the lowest grades (32, 202 and entry levels 33 or 203) were to be laid off *regardless* of where the surplus lay and *before* employees in the next highest grade could be laid off. Thus, that agreement, in effect, provided for the opposite of L-I-F-O.[10] in that a class of employees had to be cleared out, regardless of seniority, before employees in the next highest grade could be laid off. (Grider, 45: 5516). Only then would a surplus be declared, and the process of "bumping" would begin. *At the time that agreement was negotiated, 90% of all grade 32 workers were female; 80% in the grade 202-203 category were female.* (Exhibits P-77; D-204).

Plaintiff's statistics demonstrate that, under both collective bargaining agreements, women were laid off in disproportionate

---

9. The collective bargaining agreement effective August 14, 1974 (hereinafter the "1974 Agreement") provided that when lack of work necessitated decreasing the workforce, it would be accomplished in the following manner (P-86(b)):

> (a) employees in Grades 32, 202 and entry level Grades 33 or 203 would be laid off first in inverse order of security (without regard to where the surplus actually existed);
>
> (b) the surplus would *then* be identified by occupation, grade and Department Chief's organization;
>
> (c) the process of displacement would then occur by Manager's organization for employees with less than ten years service and plantwide for those with more than ten years service.

10. LIFO means the last-in-first-out. In collective bargaining the term commonly used having the same meaning is strict-seniority-plantwide without regard to department or occupation (Lenz, 47: 5739). In a LIFO or strict-seniority-plantwide situation, an employee is permitted to displace a less senior employee regardless of occupation. (Lenz, 47: 5740).

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numbers, seniority notwithstanding, and that they were "bumped" by men. For example, Exhibit D-204 demonstrates that within five different grade 32 occupations, the numbers of women relative to the number of men changed drastically between 1970 and 1977. While in 1970 there were 90 female (and no male) grade 32 adjusters, by 1977, there were 51 females and 33 males within this grade and occupation. Similarly, in 1970 there were 648 female grade 32 benchhands; in 1977, there were only 275 females within this grade and occupation, while within this same period the number of men had increased from 66 to 214:

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OCCUPATION	1/10/70		1/15/71		1/10/72		12/4/72		1/6/74		12/2/74		12/1/75		1/3/77	
TITLE	32		32		32		32		32		32		32		32	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Adjuster		90		54	4	80	3	103	2	101	2	101	131	55	33	51
Assembler	72	654	36	466	50	441	60	468	61	496	56	446	145	264	146	251
Benchhand	66	648	30	404	42	515	37	578	40	648	50	567	210	344	214	275
Coil Winder		47		42		41		34		44		39	8	24	17	21
Wireman	2	638	2	317	1	366	1	397	1	368	3	382	32	244	12	196

(Comparison of Seniority of Men and Women)

	1974				1976			
			Av.F	Av.M			Av.F	Av.M
	Total		Ser.	Ser.	Total		Ser.	Ser.
	EES	%F	Date	Date	EES	%F	Date	Date
GRADE 32*								
Adjuster	102	98	67-2	68-7	74	70	59-12	56-11
Assembler	492	88	62-5	68-7	393	63	55-8	57-7
Coil Winder	37	100	67-9	-	38	55	60-11	58-12
Benchhand	611	93	63-4	65-4	493	56	56-2	57-5
Wireman	365	99	68-6	64-4	222	92	61-6	61-6

(Exhibits P-218, P-220, P-222).

IX. WAGES

By overwhelming statistical evidence, plaintiff has established that women at Western earn less than men. This result is not surprising; indeed any other would be, given Western's policies which slot women initially into lower grades, exclude them totally from certain kinds of work, overlook them for advanced training and promotion, and lay them off in times of business adversity. All that being so, however, the Court finds that at this time it is virtually impossible to fix a monetary value on either what all the women employees in the class have lost, or what any one of them—exclusive of the plaintiff herself—may have lost as a result of Western's discriminatory employment practices. The Court, at least at this stage, is simply not prepared to accept or adopt the regression analysis of plaintiff's expert, Dr. John Ullman. The Court found Dr. Ullman's testimony unhelpful in determining this issue, in large part because his criteria and their valuations were quite arbitrary and subjective, and, frankly, in larger part because his testimony was simply not comprehensible to the Court. There will have to be a second stage in this case, at which time we will determine the amount of damages the class or any member of it, has sustained. It is sufficient for now to find that wages have been lost by women as a result of sex discrimination by Western and to reserve for later the determination of just how much.

X. OTHER EVIDENCE OF DISCRIMINATION AT WESTERN

Were this merely a case based on statistics, we would already be satisfied that the plaintiff has discharged her burden; indeed, under *Teamsters, supra,* a statistical showing such as this would compel that result. However, we have before us the rare

case in which the plaintiff, in addition to the circumstantial evidence of her statistical case, has produced direct evidence of discriminatory intent. Plaintiff here has done more than provide the Court with cold statistics; she has exposed the very attitudes which produced those statistics in the first place; attitudes held by individuals in key positions at Western, which regard certain jobs as suitable for men only, and others—inevitably the lowest paying—as suitable for women only.

We turn first to the "Requisition for Personnel" forms.

The history of the "Requisition for Personnel" forms—their alteration by employees of the defendant and their eventual discovery by the plaintiff—was the subject of an earlier opinion by this Court:

> Plaintiff's counsel, on March 31, 1976, while conducting discovery on the Western premises, came upon certain documents—Requisitions for Personnel—the existence of which had theretofore been unknown to plaintiff. These Requisitions were forms sent by a company supervisor to the Western Personnel Office when a supervisor had a position to fill within his department. Only three such Requisition forms were found, each stapled to Placement Lists which had but recently been made available to plaintiff through discovery. Because there were hundreds of Placement Lists, all showing staple markings, plaintiff's suspicions were aroused. She wanted to know the whereabouts of the remainder of the Requisition Forms. The answer to this question seemed critical because *the Requisition forms contained blanks where a*

supervisor, by making an X mark in the appropriate space, could indicate whether he preferred a male to fill the slot, or a female, or whether he had no sex preference. At a conference scheduled before the United States Magistrate later that week, plaintiff's counsel, Ms. Vladeck, expressed concern about what she considered to be tampering with the evidence, that is, the detachment of the requisition forms from the placement lists. Mr. Lynch, counsel for Western, and Ms. Vladeck attempted to work the matter out *inter sese,* and on April 8th, Western Electric turned over to plaintiff some two thousand requisition forms. Upon examination of these forms, Ms. Vladeck's suspicions were further excited. It appeared that the forms had been altered to obscure the fact that supervisors using the forms had indicated sex preferences, and to obscure the particular sex preference which the supervisor had indicated. Unlike the three forms discovered on March 31st, many of the forms had X marks, in different colored inks, in all three sex preference blanks—M, F, and M or F.

The following day, plaintiff brought an emergent application before the Court charging that the forms had been deliberately and recently altered by Western Electric. Although counsel for Western denied that the forms had been recently altered, the Court deemed it appropriate to give plaintiff an opportunity to have an expert examine the documents in order to substantiate the claim of recent alteration, and to protect the

forms and from possible further alteration. Accordingly, the Court ordered these documents removed from Western's possession, granted temporary custody of the forms to plaintiff, and authorized her to engage in discovery to support her charges that the Requisition Forms had been improperly withheld and altered.

Plaintiff proceeded with her investigation and presented an Order to Show Cause why Western Electric should not be punished for contempt. She maintained that she could prove that the Requisition Forms had been altered between the time they had been requested and the time they had been turned over. A return date was set for June 17th.

Two days before the return date, counsel for Western Electric requested an opportunity to appear before the Court. He conceded that the Requisition Forms had been recently altered. Furthermore, he conceded that Western Electric employees may have committed perjury in deposition testimony concerning the forms.

Kyriazi v. Western Electric, 74 F.R.D. 468, 469-70, n.2 (1977).

At trial it developed that Western's employees not only "may have committed perjury in deposition testimony concerning the forms", as conceded by Western's counsel, but that they actually did. Not only did they give such false testimony under oath, but, as they finally admitted at trial, they

altered the Requisition for Personnel forms to conceal the fact that Western's supervisors had been expressing a sex preference for men in the hire and promotion of employees.[11]

---

11. Thus, for example, Catherine Neal testified as follows:

BY MRS. VLADECK:

Q. Mrs. Neal, on April 25, 1976, you gave testimony in Mr. Lynch's office. I asked you questions and you answered them.

Do you recall that?

A. Yes.

Q. And have you recently reviewed the testimony you gave there? Have you recently read it?

A. Yes.

Q. Let me ask you some specific questions.

On Page 61 of transcript I asked you, Mrs. Neal, what you did when you got the four copies back from the line organization?

* * *

THE COURT: Was it accurate?

THE WITNESS: No, I'm very sorry. I just didn't want to admit my boss told me to cross out the X's and I'm sorry I lied.

THE COURT: Are you telling me that you lied under oath?

THE WITNESS: I didn't realize how serious it was.

(Cont'd)

(Cont'd)

THE COURT: Did you understand that you had been sworn?

THE WITNESS: I understood it, but I still didn't, you know, I didn't know it was really that serious.

THE COURT: Aside from whether you regarded the placing of the X's as serious, did you understand that you had been sworn to tell the truth at the time you were deposed?

THE WITNESS: I knew I had been sworn in.

THE COURT: And did you thereafter deliberately give false testimony?

THE WITNESS: Your Honor, I did.

* * *

THE COURT: What was the occasion that Mr. Riordan told you that?

THE WITNESS: I really don't remember.

THE COURT: What was the conversation in the machine room with Mr. Hobbie and the other analyst?

THE WITNESS: This was concerning X marks on the requisitions, male, female, and mail [sic] or female.

THE COURT: What did Mr. Hobbie say?

THE WITNESS: He wanted to know whether we had recently put those Xes [sic] on the requisitions.

THE COURT: Where on the requisitions?

(Cont'd)

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(Cont'd)

THE WITNESS: In male, female and male or female. There were X's on all of those columns.

THE COURT: Madam, did there ever come a time you in fact, under the instructions of Mr. Riordan, put X's in those boxes?

THE WITNESS: Yes.

THE COURT: Was that before or after the meeting with Mr. Hobbie?

THE WITNESS: I think the meeting—I think that was on a Monday and the meeting was on a Tuesday.

THE COURT: In other words, on Monday you altered those documents?

THE WITNESS: Well, I wouldn't call them altered. I was just doing what he says. But I wouldn't call them altered, the documents. I wasn't [sic] call them altered.

THE COURT: Did you change them?

THE WITNESS: Yes.

THE COURT: Did you change them because he told you to?

THE WITNESS: Because he told me to, not knowing how serious it was. Not realizing.

THE COURT: Did he tell you why he wanted you to change them?

THE WITNESS: No, he didn't. I told him I was very busy that morning, but he wanted me to change them before lunch.

(Cont'd)

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(Cont'd)

THE COURT: Did he tell that to anybody else?

THE WITNESS: Two other investigators.

THE COURT: What are their names?

THE WITNESS: Armand Zambartti [sic] and Hank Sawicke.

THE COURT: How many personnel requisition forms did you change roughly?

THE WITNESS: I don't know.

* * *

(Tr. 17: 1844-5; 1835-7)

Armand Zamb di testified:

THE WITNESS: I don't like to use the term "altering."

THE COURT: Putting in X's or changing them or whatever you want to use?

THE WITNESS: Yes.

* * *

THE COURT: Did there come a time when you were summoned to take a deposition in connection with this case?

THE WITNESS: Yes, sir.

THE COURT: Were you summoned to a lawyer's office and there placed under oath?

THE WITNESS: Yes, sir.

(Cont'd)

(Cont'd)

THE COURT: Did you understand that you were sworn to tell the truth on that occasion?

THE WITNESS: Yes, sir.

THE COURT: Did you understand that if you didn't tell the truth, that if you lied, it would be the crime of perjury?

THE WITNESS: I didn't realize the full seriousness of what I did, sir.

THE COURT: When you were placed under oath were you asked questions concerning whether or not you had altered those documents?

THE WITNESS: Yes, sir.

THE COURT: Did you tell the truth?

THE WITNESS: No, sir.

THE COURT: Why?

THE WITNESS: Again, I just wanted to protect my supervisor. That's the only answer I can give you.

THE COURT: From what?

THE WITNESS: I guess that we marked them, the documents, sir.

THE COURT: What did you understand was wrong about marking them?

THE WITNESS: As I say, I realized after the situation that I marked evidence.

THE COURT: Did you know that when you were under oath in those depositions?

(Cont'd)

(Cont'd)

THE WITNESS: I guess—yes.

* * *

(Tr. 17: 1980-3).

Henry Sawicke testified:

THE COURT: Did you understand when you were filling in forms you were doing something wrong?

THE WITNESS: No.

THE COURT: Did you understand when Riordan told you to fill in those forms he was doing something wrong?

THE WITNESS: I don't know if there was anything wrong because it was our job to do that originally.

THE COURT: But you felt you had to deceive Hobbie to protect Riordan?

THE WITNESS: That's correct.

THE COURT: Did you feel the truth would hurt Riordan?

THE WITNESS: I—the only thing bothered me was why didn't Riordan tell him that he told us to do it.

THE COURT: Why didn't he?

THE WITNESS: That's the only thing bothered me.

THE COURT: How do you know he didn't?

THE WITNESS: I don't know. He didn't tell us in the room. He didn't say anything.

THE COURT: He stood there silently?

(Cont'd)

(Cont'd)

THE WITNESS: He didn't say anything.

* * *

THE COURT: Thereafter, did you undergo depositions in this case?

THE WITNESS: Did I do what?

THE COURT: Were you given notice that you would be required to testify under oath in this case?

THE WITNESS: Yes, I was.

THE COURT: Did you go to a lawyer's office and so testify?

THE WITNESS: I did.

THE COURT: Were you asked questions concerning whether or not you had put X's on the boxes?

THE WITNESS: Yes.

THE COURT: Before you were asked those questions were you sworn to tell the truth?

THE WITNESS: Yes.

THE COURT: Did you tell the truth?

THE WITNESS: No, sir.

THE COURT: Did you lie under oath?

THE WITNESS: I lied on that one.

THE COURT: Did you understand when you lied under oath you were committing a crime?

(Cont'd)

Requisition for Personnel forms which had boxes to indicate sex preferences were employed by Western. From the early 1960's until the day after Kyriazi discovered them in Western's files.

A Requisition for Personnel form was a form filled out initially by a Western supervisor, typically a section chief, when a job vacancy occurred in his organization. The form described the job opening, and, in a separate printed box, enabled the supervisor to check "M", "F", or "M" or F", depending on whether he wanted the vacancy filled by a male or a female.

The Requisition forms were endorsed by three levels of supervisory personnel. Thus, after the section chief filled in the

THE WITNESS: Well, we felt because there was nothing ever wrong with these T's, it was our fault with not marking them. I thought there was nothing wrong with them.

THE COURT: Did you hear my question?

THE WITNESS: Yes.

THE COURT: Did you believe or did you understand that when you lied under oath you were committing a crime known as perjury?

THE WITNESS: At that time I didn't even think of it.

THE COURT: Did you think it was all right to lie under oath?

THE WITNESS: It never came to my mind at that time.

(Tr. 17: 1948—50)

necessary information—*including the sex preference*—the form was forwarded to the department chief for endorsement and then to yet a third level of supervision, generally the assistant manager, for his endorsement.[12] It is apparent, therefore, and the Court so finds, that employees at every level of operating management knew that these forms were routinely used throughout the company.[13]

---

12. It must be noted that if the initial request originates above the section chief level, for example at the department chief level, the form, with its sex preferences, still requires three levels of approval. In that case it must be signed not merely by the assistant manager, but also by the manager of the department, and there is a box on the form with the printed title of manager and a place for the manager's signature.

13. In fact, Kenneth Kubicki, who for a time was in charge of Equal Opportunity at Western, admitted that *he* was aware these forms were in plantwide use:

> THE COURT: Were you aware of the fact that your line supervisors were designating on the Request for Personnel forms their sex preferences?
>
> THE WITNESS: There was—when it was called to my attention, a "W" or an "M."
>
> THE COURT: That's a man or a woman, isn't it?
>
> THE WITNESS: I looked at the 35-W as possibly a wage incentive opening. I didn't look at this as man or woman, I looked at those forms many times.
>
> THE COURT: You were unaware that your line supervisors were routinely indicating or had the ability to indicate sex preferences on their Request for Personnel?

(Cont'd)

(Cont'd)

> THE WITNESS: After the fact this was told to me, then I could see it very clearly. While it was going on, to me—the "W" to me I interpreted as possibly wage incentive opening. I never interpreted it as "man" or "woman."
>
> THE COURT: What does the "M" stand for?
>
> THE WITNESS: That could be some other coding. That was none of my concern.
>
> THE COURT: Were you ever a line supervisor?
>
> THE WITNESS: In the Toolmaker Training School.
>
> THE COURT: Did you use those forms?
>
> THE WITNESS: Yes.
>
> THE COURT: Did you indicate a check next to an "M" or a "W"?
>
> THE WITNESS: No. I told my secretary to make a form for an opening and place that place that [sic] with Personnel and approve it.
>
> * * *
>
> THE COURT: When did you first become aware that the line supervisors were, in fact, indicating sex preferences?
>
> THE WITNESS: When there was an investigation in June of '76—well, it was before this Court and there was a lot of furor and activity.
>
> THE COURT: Was that the investigation concerning possible subsequent alteration of those documents?
>
> THE WITNESS: You're right. Yes, your Honor.

(Cont'd)

(Cont'd)

THE COURT: You mean until there was an investigation into the destruction or alteration of those documents, you were unaware that there were documents in existence being routinely used by the company by which four or 500 line supervisors could express sex preferences?

THE WITNESS: It may sound naive, but that's true.

THE COURT: And it was you who were in charge of any independent investigation into whether or not line supervisors were acting discriminatorily?

THE WITNESS: We would investigate the charge, yes. And, of course, it was my concern.

• • •

THE COURT: Were you aware that these forms, P-111, were in use?

And by the way, there is no M and W; there is an M and F, and it is under a block for sex.

THE WITNESS: Yes.

THE COURT: Were you aware that they were in use?

THE WITNESS: I had a passing acquaintance with them being in use, but my occasion to use them was very rare.

THE COURT: Did you, yourself, use these forms when you were a line supervisor?

THE WITNESS: I really don't recall. It has been so long.

(Cont'd)

(Cont'd)

THE COURT: As the man in charge of Equal Opportunity, were you aware that line supervisors were using these forms routinely whenever they had a vacancy to fill in their section?

THE WITNESS: Yes.

THE COURT: You knew that?

THE WITNESS: Yes.

THE COURT: Then you knew they were expressing sex preferences for hiring openings, that is so?

THE WITNESS: The form says so, yes.

THE COURT: I know the form says so. I'm asking you whether you knew that they were doing that?

THE WITNESS: I would have to admit to it, yes.

THE COURT: What do you mean, you would have to admit to it?

THE WITNESS: Well, I know EO, the investigation of going over many of these forms, sometimes the opportunity never occurred.

THE COURT: I don't understand what you just said, sir.

THE WITNESS: What I'm saying is that I had a limited exposure to these forms.

BY MRS. VLADECK:

Q. May I ask you a question, Mr. Kubicki? As Department Chief—

(Cont'd)

(Cont'd)

A. Yes.

Q. — if there was a requisition for any personnel in your department, don't you have to sign one of these before any job can be filled in our [sic] department? Not just as a line supervisor, but as a department chief, are you not obliged to sign off on one of these before any job could be filled in your unit?

A. This is only reasonable that I have had people that I could — that I could requisition people for positions. I was without protfolio [sic] for many years. The new form doesn't appear to be like this.

THE COURT: I'm not asking about any new form. I'm asking about the form that you just were shown, P-111. Apparently that form was used for many years. It was used by hundreds of line supervisors, approved by their department chiefs, and used to fill literally thousands of vacancies throughout the plant. Isn't that so?

THE WITNESS: Yes.

THE COURT: You say you would have to admit that you knew that that form was in use during the time that you were responsible for Equal Opportunities within the plant; that is so?

THE WITNESS: Yes.

THE COURT: You say that you understand it is in violation of the law for a supervisor to take into consideration the sex of an employee filling the job; is that so?

Didn't you tell me that a moment ago?

(Cont'd)

(Cont'd)

THE WITNESS: I don't know if I said it that way.

THE COURT: Well, as to—

THE WITNESS: Because of sex.

THE COURT: Yes.

THE WITNESS: Yes. To wipe somebody out because they were male or female, that is discriminatory.

THE COURT: Well, what about if you say you wanted a male or you wanted a female for the job? That, in effect, is telling the personnel department, isn't it, that they want a specific employee of a specific sex to be sent; isn't that right?

THE WITNESS: Yes.

THE COURT: Is that or is that not a violation of law as you understood it while you were in charge of Equal Opportunities?

THE WITNESS: Yes.

THE COURT: It therefore follows, doesn't it, that you knew that employers were indulging in these practices?

THE WITNESS: I guess I would have to admit to that, that I knew, but, again, limited exposure to the forms.

* * *

(Tr. 1590-98.)

Not surprisingly, the Requisition for Personnel forms did little to enhance the position of women at Western. That males were preferred for the highest graded jobs at Western, and women for the lowest, is dramatically illustrated by the following table compiled from P-114 ("1974 Requisitions Containing Sex Preferences"):

Position	No. of Males Requested	No. of Females Requested
Grade 32 openings	9	87
Grade 33 openings	52	8
Grade 34 openings	76	9
Grade 35 openings	60	1
Grade 36 openings	41	0
Grade 37 openings	23	1
Craftsmen	11	1 (for female waste and water treatment operator)
500 Series Clerical	All	0
Clerical, grades 209 and above	All	0
Section and Department Chief	9	0

Western does not deny that the Requisition for Personnel forms were used throughout the company for many years. Rather, it claims that new forms were printed up in 1972 and that the old forms were still used in 1976 *solely* because supervisors were instructed to exhaust the old forms before using the new forms. Even so, it does admit that even *after* 1972,

between 1974 and 1976, 27% of the forms did in fact designate a sex preference. (Vines, 12: 1224). Nevertheless, while admitting the continued use of the sex designation boxes after 1972, Western still claims that this "spirit of economy" was the only reason for the continued use of these forms from 1972 until April 6, 1976, *one day after the plaintiff found out about them as a result of Court-ordered discovery.* For obvious reasons the Court rejects this defense.

In a further attempt to downplay the significance of the sex designation forms, and their use even three years after this lawsuit was commenced, Western claims that the sex preferences were filled in by the *secretaries* of the section chiefs rather than by the section chiefs themselves. (Tr. 2094, 2098).

However, even the author of that theory, Mr. Norman J. Hobbie, who was the Assistant Manager for Western, and for a time the corporate official in charge of Equal Employment Opportunity at Western, conceded that this theory made little sense:

> Q. Why did you want them there?
>
> A. I wanted to hear from them because of my mind I recognized the use of old forms was certainly not something that was good so far as this particular case; that I knew it would be used against us in some way.
>
> Q. Why?
>
> A. Because it showed that the company showed preference for a particular sex.

Q. Or at least somebody in the company?

A. That somebody in the company —

Q. Showed that your line supervisors actually did care whether they were getting males or females?

A. That could be an assumption. My own feeling is that they ignored that area of the form.

* * *

Q. Who filled out the form?

A. I must have filled one or two out in the time that I was at Kearny. And I can only evidently say I don't recall ever seeing a box that said, "Male", "Female," or anything. I just never looked at it.

* * *

Q. So the forms to the extent they had been filled out by line supervisors did indicate that those line supervisors did have a preference, didn't it?

A. They or their secretaries, you know.

Q. They had to sign them.

A. I see, your point, that, yes, you sign a piece of paper.

Q. Then it had to go up to the Department Chief for his countersignature; isn't that right?

A. I think it goes through three levels. I'm not sure.

Q. They all have to sign it?

A. Yes.

Q. Is that why you were concerned that it might be used against the company?

A. I was concerned because I felt it was something that was damaging.

(Tr. 2093-2095).

While it is true that several other employees of Western testified that during the years 1972 through 1976 they, in personnel, had disregarded the expressed sex preferences of the Western supervisors in processing the forms and filling the openings, in light of their admitted perjury and attempts to conceal and alter this evidence, the Court rejects such testimony as unworthy of belief and finds that the supervisors themselves knew of the continued use of the Requisition forms.

We catalogue other examples drawn from the abundant evidence of the discriminatory attitudes which prevailed at Western: ads for stenographers, typists, and keypunch operators describing women as "the other half of the team" (Exhibit P-53); the male only help-wanted newspaper ads used by Western until at least mid-1970 for all jobs except clericals (Anderson, 6: 425;

Exhibits P-52, P-53); employment test results placed on different colored cards for men and women (blue for women, white for men); "word-of-mouth" hiring which, as plaintiff's statistics demonstrate, worked to the substantial disadvantage of women.[14]

This direct evidence of discriminatory intent and purpose sheds light upon and validates the inference which flows inevitably from plaintiff's statistics.

XI. WESTERN'S DEFENSES TO PLAINTIFF'S PRIMA FACIE CASE

As noted earlier, a Title VII plaintiff may discharge her initial burden by creating, on statistics alone if need be, an inference that the employer has systematically discriminated against the class in its employment practices. Here, the impressive statistical showing made by the plaintiff, bolstered

14. *See*, for example, the statistics set forth in plaintiff's exhibit 19, showing that during the 1967-76 period, 86.1% of the "new hires" referred by a friend or relative were men:

NEW HIRES WHOM WESTERN ADMITS WERE REFERRED BY A FRIEND OR RELATIVE
1967-1976

	NUMBER	PERCENT
Male	105	86.1
Female	17	13.9
TOTAL	122	100.0

(P-19)

with evidence showing the discriminatory intent of Western's supervisors, clearly discharges her burden with respect to Western's practices in the areas of hiring, promotion, participation in job training programs, layoffs and, as a result of the foregoing practices, wages as well. The burden now shifts to Western to furnish an explanation for those statistical imbalances.

We turn now to Western's defenses.

A. Western's Defense to Discriminatory Hiring of Women into Grade 32

Western does not dispute plaintiff's statistical showing (*see* V, *supra*) that women are hired disproportionately into grade 32, while men are hired into grade 33. Rather, it claims that it did women a favor by hiring them into this lower grade. (Def's Pr. Findings 570-575). It attempts to support this by arguing that since grade 32 Piece Workers—the category into which more women are hired than any other—earn more than grade 33 Day Workers—who are primarily men—women in grade 32 earn more than men hired at grade 33.

The basis of this contention is defendant's Exhibit 183-d admitted over the strenuous objection of the plaintiff and notwithstanding the Court's own expressed doubts as to the exhibit's reliability based on Western's destruction of the underlying data.[15]

15. William Ammermann, a Senior Information Systems Staff member at Western and the author of D-183, admitted that the exhibit had been prepared solely for the purpose of this litigation. He further admitted that the salary data which were used to prepare the exhibit were no longer in existence. (Ammermann, 41: 5022-4).

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D-183-d purports to demonstrate that grade 32 Piece Workers earn more than grade 33 Day Workers by setting forth the average weekly earnings for grades 32 and 33 Piece Workers on the one hand, and for grades 32 through 36 Day Workers on the other. Western had available the actual earning rate of these workers for the last fiscal week in 1971, 1974, 1975 and 1976. To these actual earning rates, it added a shift differential and, in the case of Piece Workers, the piece work percentage. The rate was multiplied by 40, representing the 40 hour work week. Thus, defendant claims that grade 32 Piece Workers earn $25 to $36 more per week than grade 33 Day Workers.

Having heard the testimony of the exhibit's author, Mr. Ammermann, the Court remains dissatisfied with that testimony and thus rejects D-183-d as unreliable. Moreover, to accept defendant's contention would be to find that the disproportionate grouping of women in grade 32 and men in grade 33 represents a favoring of the women over the men. In the context of the evidence of this case, such a suggestion is, to say the least, implausible. Nor did Western offer any evidence suggesting that women were offered the grade 33 positions, or that they turned such positions down in favor of the more "desirable" grade 32 jobs. In any event, it is clear to the Court, and the Court so finds, that in terms of promotion and layoffs, these women were severely disadvantaged by having been placed in the lower grades. Accordingly, the Court rejects this defense and finds that Western discriminated against women by hiring them into grade 32.

B. Lack of Interest

Western seeking to rebut plaintiff's statistical evidence regarding promotions, claims that women were not promoted because they were simply not interested in promotion.

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The record demonstrates, however, that when an employee was considered for promotion it was his supervisor who initially determined whether the individual was interested in promotion. (Hayeck, 42: 5206; Matthews, 43: 5252; Rotheramel, 43: 5273). If the supervisor represented that the individual was not interested, that individual was not interviewed and, indeed, never learned that he was a candidate for promotion. (Vines, 12: 1232). Further, the evidence demonstrates that women were never afforded the opportunity to express their alleged lack of interest, because they were rarely even considered for promotion:

Employee Placement Recommendation Forms
1970—July 1976

Period	No. of Males Recommended	%	No. of Females Recommended	%
1970-1974	88	89	11	11
1975	95	74	31	20
Jan.-July 1976	223	82	49	18

(Exhibit P-117).

The Court finds that Western itself became alarmed at these initial recommendations, and particularly at the "not interested in promotion" label utilized by Western to justify either the disqualification of a woman or the ultimate award of the promotion to a male. Thus, on February 22, 1974, P-115 was circulated to all managers:

February 22, 1974

MEMORANDUM TO ALL MANAGERS:

Re: Placement Procedure

This will supplement Mr. Hobbie's memorandum of February 6, 1974.

We have an additional Equal Opportunity requirement that compels us to document all cases where a female or minority group member is disqualified for upgrading or reclassification.

We recognize the burden that this will place on your organization but our Headquarters has reached this agreement with the federal agencies and we have no choice but to follow their direction.

Each case and each incident of disqualification must be documented individually over the signature of the line Department Chief. The memorandum should accompany the placement list and the GN-92-3-CP-Rerate, Reclassification and Transfer Authorization form on the selected employee. The form cannot be processed by Personnel unless we receive the memorandum and placement list.

The documentation should contain the specific reason why the female or minority group member was disqualified.

If we receive multiple disqualifications, that appear justified, on an individual recommended for a particular grade and occupation, we will discuss the recommendation with the originating line organization. However, if the employee appears on a placement list due to being in a group selected as a feeder

and the group is consistently disqualified, we will review the selection of feeder occupations with the line organization. By taking such measures, we would hope to avoid unnecessary correspondence on your part.

The Personnel Department has been notified of the above.

/s/ K. C. DREW—41000

Ten months later, that memorandum was updated by P-116:

December 26, 1974

TO ALL ASSISTANT MANAGERS:
Re: Placement Procedure

As you are aware, our affirmative action compliance agency (Department of Defense), the Equal Employment Opportunity Commission, and the State Division on Civil Rights have become very active in monitoring our progress in the movement of minorities and females into higher graded jobs.

In February and April of this year, we informed you of an Equal Opportunity requirement which necessitated the documentation over the line Assistant Manager's signature of all cases where females and minority group members are disqualified for upgrading or reclassification.

Effective immediately, we will also require documentation on cases where females and minorities turn down or refuse opportunities for upward movement. The documentation, over the line Assistant Manager's signature, should include the specific reason for the refusal.

We recognize that we have many instances of turndowns of upgradings by our employees for good reasons. However, when we fail to move minorities or females for any reason, we will need documentation which will be our most effective defense.

We would appreciate your advising your Department Chiefs and Section Chiefs of this requirement.

/s/ N. J. HOBBIE—41200

Copy to:
Managers
Manager, Merchandise and Service
Resident Head, Manager

Nevertheless, despite these directives, no documentation was supplied even though women continued to be turned down for "lack of interest". Mr. Elles Vines, who in May 1977 became head of EEO, testified that pursuant to P-115 and P-116, supervisors at Western "documented" each instance of "non-interest" or "disqualification" whenever either reason was used to pass over a woman for promotion. He testified that the system had a failsafe provision in that it was monitored by a half-dozen personnel analysts who would insist that such separate memos accompany each such passover. Upon direction of the Court, Vines agreed to produce these "substantial" number of memoranda, although Western claimed that they had already been discovered by counsel for plaintiff.

The next court day, however, Mr. Vines advised the Court that Western did not have *even one* such memorandum from any one of the 400 to 500 supervisors at its Kearny plant.

He then testified that *all* of these hundreds of supervisors, *each one of them,* had simply forgotten the directive each time a woman had been passed over because of her lack of interest or because she was unqualified.[16]

16.

THE COURT: Are you sitting here telling us now the motive and the reasons why the Supervisors throughout Western Electric, except for Clark, did not comply?

THE WITNESS: [VINES] Yes, your Honor. That's what I'm trying to explain.

THE COURT: Do you know why they didn't comply?

THE WITNESS: I can assume, based on these records, that they had forgotten it. We have talked to—

THE COURT: How many Supervisors are we talking about?

THE WITNESS: By the end of '75—

THE COURT: No, by the beginning of '75.

THE WITNESS: Oh. It would be somewhere in the neighborhood, I think, of 400.

THE COURT: And you mean that you are able to say now that all 400 forgot?

THE WITNESS: That's the only reasonable explanation, your Honor.

THE COURT: Well, is it possible that they simply chose to disregard it?

(Cont'd)

Accordingly, in view of the fact that males were recommended for promotion in far greater numbers than females, thereby depriving females of the opportunity to express their "indifference", and the fact of Western's failure to document the instances of such disinterest according to its own

---

(Cont'd)

THE WITNESS: I don't know why they would choose to disregard that and not disregard the earlier letter of February.

THE COURT: What I am trying to understand is are you testifying now that you are reasonably certain that all 400 or 500 Supervisors, each one of these people, forgot this memorandum?

THE WITNESS: Your Honor—

THE COURT: There wasn't one Supervisor who remembered it?

THE WITNESS: I can't testify that not one remembered it. I can only speak for the facts. The facts are that none of them complied. I find it hard to believe that they would disregard the instruction in a case of one letter and obey it in the case of the first letter.

THE COURT: Do you find it difficult to believe that all four or 500 forgot it?

THE WITNESS: Almost, but not quite.

THE COURT: All right.

* * *

(Tr. 15: 1489-90)

directive, the Court finds no such lack of interest on the part of women at Western.

C. The Collective Bargaining Contract

Western next contends that upgrading was controlled by the collective bargaining agreement and, therefore, that such decisions were effectively out of the hands of its supervisors. However, the procedure set forth in the collective bargaining agreement between Western and Local 1470, applicable to all jobs within the bargaining unit represented by the Union, simply provided that vacancies were to be filled by upgrade or transfer of "employees who have the qualifications for the job." (Exhibits P-86(a), P-86(b)). "Qualifications" were defined as "experience", "demonstrated productive efficiency", "skill or ability", "conduct on the job" along with term of employment. Only when these factors were "relatively equal" was term of employment to be given the greatest weight.

Western gave its first line supervisors the right to determine the qualifications of candidates for upgrade or transfer, with no written criteria for evaluating these qualifications. (McCarthy, 13: 2208; Niles, 19: 2190; Vines, 11: 1139). Thus, it is clear that Western's supervisors—who, as has been shown, were routinely making sex preferences in their Requisition for Personnel forms—were at all times perfectly free to interpret these qualifications in any manner they chose. While Western contends that it considered candidates only in order of seniority, in view of the statistical showing made by the plaintiff and the other evidence of discriminatory intent on the part of Western's supervisors, we must reject this contention.

D. Defense to Statistics Regarding Layoffs

In an attempt to rebut plaintiff's statistical evidence with respect to layoffs, Western claims that in January 1975 it realized that the new layoff provision would result in the laying off of employees with longer seniority and the retention of less senior employees. (Grider, 45: 5516). Western claims that in January 1975, to prevent this from happening, it *orally* modified the 1974 Agreement with Local 1470 to follow the old practice of layoffs. (Grider, 45: 5534).

No witness could testify as to who actually bargained for Western with the Union, or where or when the alleged agreement was made. Grider testified that the modification was "probably" made by him and either the President or one of the officers of the Union. (Grider, 45: 5534). Nor was this "oral" modification ever communicated to employees or subject to ratification. (Grider, 45: 5536). Moreover, on August 13, 1977, Western and Local 1470 entered into a new agreement, effective August 7, 1977, which provides for the layoff of employees first from grades 32 or 202 and entry level grades 33 and 203 before the surplus is identified. This is the same provision, *in haec verba,* which Western claimed it orally modified in January 1975. (Exhibit P-201).

Accordingly, the Court rejects this defense and finds that Western never modified the 1974 collective bargaining contract and that it never abandoned its policy of initially laying off grades 32, 202 and entry levels 33 and 203.

XII. KYRIAZI'S INDIVIDUAL CASE

We pass now to consideration of Kyriazi's individual case. That is not to say that the evidence relating to her individual

case is to be considered separately from that relevant to the class as a whole. To the contrary. It is perfectly permissible for a minority member to establish a claimed act of discrimination against that individual by first demonstrating a general discriminatory intent against the class to which that individual belongs. Such evidence would be a piece in a mosaic which, along with other evidence, could establish the veracity of the individual's claims. The reverse, of course, is also true. Hostility to a class of persons as a whole—be it a racial, religious or gender-based class—can indeed be inferred by proven discriminatory acts directed against an individual member of that class. Thus, all of the evidence adduced in this case, class and individual alike, is to be considered as a whole in determining the question of liability to Kyriazi and/or to the class she represents. With this in mind, we turn to the specifics of her case.

Kyriazi was hired as an engineer by Western in April of 1965, just three months prior to the effective date of Title VII. She brought to Western an impressive catalogue of credentials. A native of Greece, Kyriazi received a B.S. Degree in Economics from the School of Economics and Business in Athens, Greece (1952). After she received this degree, she was employed for approximately five years by the Greek Ministry of Finance and the American Mission to Greece, where her duties corresponded roughly to that of an industrial engineer.

In 1958 she arrived in the United States, where she furthered her education. In 1961 she received the degree of Master of Business Administration from Columbia University, and in 1965 she achieved a Master of Industrial Engineering Degree, also from Columbia University. While at Columbia, she maintained a straight "B" average. (Exhibit D-26).

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An examination of numerous personnel records of Western's employees conclusively demonstrates that plaintiff was, at least by virtue of background and training, far more qualified than many of Western's entry level engineers. Nevertheless, Kyriazi was hired at a salary of $725.00 a month (Exhibit P-153), which she claims was below the salary given male engineers at hire. However, since she was hired before the effective date of Title VII, no evidence was received or even offered concerning this contention. (Pltf's Pr. Finding No. 301).

From the very first, Kyriazi's experience with Western was fraught with difficulties. From first to last, her employment history with Western was the subject of much conflicting evidence adduced before the Court.

It is Western's position that from the very first, Kyriazi was a most unsatisfactory employee. John Taddler testified that he was a Department Chief in the Finance Division of Western in New York and that he initially recommended that Kyriazi not be hired. He testified that he thought her grades too low. He also characterized her as a "slow learner".

Herbert Hornisher testified that from June to December 1965 Kyriazi was assigned to his training group. He, too, found her overall performance poor and did not recommend her for a salary increase in September or in December 1965. It was Hornisher's testimony that Kyriazi had personality problems as well and that he recommended that she be terminated.

On the other hand, Edward J. McDermott, a Development Engineer who worked daily with Kyriazi in October of 1965, while agreeing with the other Western witnesses that Kyriazi's work was poor, testified that he found her industrious, sincere,

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obedient and that he had no personality difficulties with her. Angelo M. Marca took over the department from Hornisher in December of 1965. By that time, he testified, the decision had already been made to terminate Kyriazi. He deferred telling her until after the holiday, and advised her of the decision in January. When she was so advised, Kyriazi became upset. Ultimately, it was determined that Kyriazi would be transferred to Kearny rather than terminated.

The plaintiff, of course, denies that she was an unsatisfactory employee while stationed at New York, and while the Court is not prepared to find that she was the veritable model employee that she claims to have been, either then or later, the Court is satisfied that the defendants' evidence concerning her poor performance in New York is not fully creditable.

First of all, the position for which she applied and accepted is one which required neither a programming background nor a college degree, or so at least Taddler testified. Kyriazi had three degrees, two of them from one of the most prestigious universities in this country. Taddler's testimony that her grades at Columbia were too low for a job for which no degree is required at all is simply not borne out by the record. The achievement of a "B" average at Columbia by a recent immigrant cannot be so lightly brushed aside. Finally, the testimony of her lack of ability, dearth of aptitude, and inability to communicate in English, central to the testimony of her New York supervisors, is belied by subsequent Western supervisors who at various times rated her work "above expected" (Exhibits D-49, D-51) and "B+". While it is clear that plaintiff does speak with an accent, and that at times she is difficult to understand, this is principally because she is extremely soft spoken.

Nonetheless, none of this stood in the way of her obtaining two graduate degrees at Columbia, more than satisfactory ratings from at least some Western supervisors and literally glowing endorsements from subsequent employers.

The personality of the plaintiff, her abilitity to "get along" with others—co-workers, supervisors and the like—has been challenged by Western. It is central to Western's defense that Kyriazi was a person who acted irrationally, was abusive to co-workers and to superiors, and was in general impossible to work with. Having heard witnesses with no relationship to Western as well as witnesses presently or formerly employed by the defendant, the Court concludes that while Kyriazi was and is a strong-willed person, who understandably and justifiably bridled at the discriminatory treatment she received by the defendant, she was not irrational nor was she unduly difficult to get along with, unless that term is construed to mean that she refused to supinely accede to the male-female stereotyping which confronted her at Western. The evidence in this case establishes clearly and convincingly, the sagacity of Chief Judge Breitel's language in *Pace College v. N.Y. City Human Rights Commission,* 38 N.Y.2d 37, 377 N.Y.S.2d 471, 480 (1975):

> It often happens that those who are not supine and fight for their rights will be regarded as troublesome and those disturbed by the struggle would wish that the troublesome one "would just go away."

For the reasons which follow, the Court finds that upon her transfer to the Kearny plant, Kyriazi encountered the top-to-bottom discriminatory sex policies of Western; that she refused to function within the sex segregated role expected of an

employee at Western; that she actively protested and rebelled against what she perceived to be the unfair treatment of women at Western; and that in return she was denied promotion, discriminated against by her supervisors, unfairly denied salary increases, subjected to odious personal harassment by fellow workers and, finally, fired when, instead of complying with her employer's ultimatum that she seek psychiatric help, she formally complained of sex discrimination.

When Kyriazi transferred to Kearny in 1966, as a professional employee of Western, she entered a world populated almost exclusively by men. The statistical evidence received in the class aspects of this case bears this out. During the period from 1967 through 1977, the number of female Engineering Associates ranged from zero to five; the number of males in such positions ranged from 332 to 118.[17] During the

17.

YEAR	# MALES	# FEMALES	% FEMALES
1967	332	1	-*
1968	344	2	-
1969	360	2	-
1970	360	3	-
1971	343	3	-
1972	250	3	1.1
1973	294	5	1.6
1974	277	5	1.7
1975	138	4	2.8
1976	121	1	-
1977	118	0	0

* Less than one per cent.

(Exhibit P-104).

period from 1967 to 1971, no female *ever* held the position of senior engineer; no more than 2 females at any given time held the position of Occupational Engineer; and no more than one female held the position of Engineer.[18] During the period from 1972 through 1975, no woman engineers were promoted.[19] Indeed, as late as 1974 and 1975, the Requisition for Personnel forms still specifically requested that engineering positions be filled by males.[20]

18.

YEAR	SENIOR ENGINEER		OCC. ENGINEER		ENGINEER	
	M	F	M	F	M	F
1967	161	0	272	2	24	0
1968	153	0	254	2	27	0
1969	162	0	226	1	41	0
1970	161	0	223	1	50	0
1971	157	0	255	1	19	1

(Exhibit P-101)

19. From 1972 through 1975, there were the following promotions within the Engineering category:

	Male	Female
Engineer	3	0
Occupational Engineer	46	0
Senior Engineer	30	0

(Exhibit P-102)

20. *See*, for example, Requisition for Personnel forms numbers 4-109 and 01-350 for the year 1974, for Development Engineers, in Exhibits D-220(b) and (c); Items numbers 80-10-11 and 12-13-14 for the year 1975, for 2 Occupational Engineers, 2 Senior Engineers and a Department Chief in the Engineering area, in Exhibit D-220(g).

Kyriazi entered Kearny as an Industrial Engineer, and remained in that position until February, 1969, when after her repeated requests, she was transferred to Information Systems. She alleges that during these first three years at Kearny she was discriminated against, as a woman, in that she was denied deserved promotions and salary increases because of her sex. In support of her claim she has marshalled an impressive statistical comparison between her career and those by males similarly situated. These comparisons support and lend credence to her claim. (*See* Pltf's Pr. Findings Nos. 302-315).

Western on the other hand, contends that Kyriazi performed poorly on the job, and that "these paper criteria" cannot establish the relative value of employees. While there is obvious value in the kind of analysis which Kyriazi has presented, it is also true that there are obvious limitations on its worth. For unlike statistics based on a large sample, where individual idiosyncrasies will even out, the comparison of *one* individual, on the basis of paper credentials alone, as against similar credentials of others, is of more limited value. While this evidence is certainly therefore not conclusive, it does appear to *corroborate* her claim of having been treated differently from her male colleagues. There is, however, more direct evidence which supports her claim that she was treated in a discriminatory manner.

Western's claim that Kyriazi's work and performance were not satisfactory is belied by the ratings which were given her by her supervisors at the time. In September of 1966 her work was rated "above expected" (Exhibit D-49) and again on February 27, 1967 she received the same evaluation (Exhibit D-51). This is obviously not the sort of job evaluation one expects an unsatisfactory employee to obtain.

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Having sustained this rating of "above expected" for two years, Kyriazi was promoted and transferred. In about October of 1968 she came under the direct supervision of Ralph J. Imandt. She remained under Imandt's supervision until she was transferred to Information Systems in February of 1969.[21] It is clear that relations between Kyriazi and Imandt were not good. Kyriazi claims it is because Imandt did not want women working for him. She testified that he underutilized her as an engineer, told her that she would never be rated more than "C", and advised her that as a woman she should become a school teacher, "the best profession a woman can have." (Tr. 2442). It was her testimony that Imandt made life so uncomfortable for her, that by March of 1968, just three months after she had come under his supervision, she applied for a transfer.

Imandt denies that he mistreated her because of her sex. While Western now claims that it was "Imandt's opinion that Kyriazi did satisfactory work and had the potential to progress to higher ratings" (Def's Pr. Finding No. 889), it was his testimony at trial that her attitude and personality were unsatisfactory and that she had a "chip on her shoulder."

Having heard the testimony and having observed the demeanor of both witnesses, the Court credits Kyriazi's testimony and does not credit Imandt's. In addition to the Court's observation of the demeanor of these two witnesses, the surrounding circumstances appear to corroborate Kyriazi. Before addressing these matters, a word must be said about the rating system used at Western.

21. Imandt actually took over the department in October of 1967. However, he suffered a phlebitis attack on the day he assumed charge of Kyriazi's department and was out on disability until some time in January of 1968. (Tr. 3387). These dates become significant later.

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Professional employees at Western are periodically appraised, and, based on their job performance, are graded, A, B, or C, or "outstanding", "above expected", or "expected". (Exhibit P-91(b)(2)). During Kyriazi's tenure at Western, there was a policy of curving these evaluations, so that only 25% could be rated A, 50% at B, and 25% at C. An employee's rating served as a basis both for promotions and raises. (Exhibits P-91(c)(3), (4), (5)).

When Kyriazi first came under Imandt's supervision, her rating was "N", meaning that she was a new employee who had not yet been rated. Although Kyriazi had been rated "above expected" before her transfer in 1967, Imandt considered this to be a grade of "C" (Kyriazi, 21: 2436) and he treated her as a new employee. (Imandt, 28: 3435). In early 1968, Kyriazi complained to Imandt about her rating, and also about the way in which women were treated in Western and the industry. She also told him that the failure to give her challenging assignments was a form of discrimination. (Kyriazi, 21: 3450).

It is clear that Kyriazi's complaint to Imandt about job discrimination against females alarmed not only Imandt, but Imandt's superiors as well. The fact is that although Kyriazi had worked for Imandt for only three months, and notwithstanding Western's assertion now that Imandt thought her work satisfactory and promising, Imandt, *on instructions from his superiors,* began to keep a running written account of his conversations with Kyriazi.

The first such entry is dated March 7, 1968, and refers to Kyriazi's earlier complaint of being unfairly rated and her prompt request to be transferred. (Exhibit D-74). Imandt's testimony, with its internal inconsistencies, as to the genesis of D-74 and his evaluation of Kyriazi is itself noteworthy:

THE COURT: They wanted a record, is that it?

THE WITNESS: Yes.

THE COURT: So I gather then that you don't have a similar memorandum for each one of the people that worked for you but rather you created this one because of the difficulties with Miss Kyriazi; is that it?

THE WITNESS: I had notes of other conferences with people.

THE COURT: But nothing like this document, D-74?

THE WITNESS: No.

THE COURT: That was created because of the difficulties with Miss Kyriazi, is that it, or so you believed?

THE WITNESS: So I believed.

* * *

THE COURT: In other words, you had some idea back in '68, then, that there might be some difficulties?

THE WITNESS: Well, she had appeared so unhappy over the situation that she was working in and the fact that she told me she was going to go up the line, I thought it wise to make some notes.

THE COURT: She also complained to you about sex discrimination, didn't she?

THE WITNESS: Yes. In fact, she was very much—I would say almost like walking around with a chip on her shoulder waiting for somebody to knock it off to prove that she was being discriminated against.

THE COURT: How many times and how many conferences did she mention sex discrimination to you?

THE WITNESS: That I wouldn't know.

THE COURT: Was it a frequent occurrence? You say she walked around with a chip on her shoulder.

THE WITNESS: I would say quite—she never missed an opportunity to bring it up.

THE COURT: And when did she begin to complain about sex discrimination to you?

THE WITNESS: That I don't recall.

THE COURT: Was it from the very first time that she began to complain about anything, or was it later on?

THE WITNESS: I would say yes, it was—something was in the back of her mind at all times.

* * *

THE COURT: What was the nature of her complaint about sex discrimination?

THE WITNESS: Well, that women in general were not treated on the same basis as men were.

THE COURT: In what way?

THE WITNESS: Well, they weren't given the opportunity to do the kinds of jobs that men were assigned to; a feeling that even in the grading or ranking order this had a bearing on it.

THE COURT: This was back in '68. She was making these complaints then?

THE WITNESS: Yes.

THE COURT: What responses did you make to her?

THE WITNESS: I assured her that it made no difference what the sex was. If a person had the capabilities of doing the job, they would be given an assignment.

THE COURT: At that time was there a sex preference designation box for personnel requisition form?

THE WITNESS: I believe there was, yes.

THE COURT: Did you use that form as a department chief?

THE WITNESS: I would have to say yes.

THE COURT: When you used it, did you fill out that box indicating a sex preference?

THE WITNESS: I would have to say yes. This was a custom not only at Western Electric but throughout industry.

* * *

THE COURT: And what preference did you express when you expressed it?

THE WITNESS: I'm not too sure—I'm not too sure that we did check it off as a male operator or—a male engineer.

THE COURT: Perhaps I'm wrong. I thought that you just indicated to me that you did express a preference.

THE WITNESS: I did. I'm not too sure. I'm a little fuzzy.

THE COURT: You mean it may have been that you expressed a preference for women?

THE WITNESS: I'm sure I didn't express a preference for women on the job. It may have been either.

THE COURT: It may have been what?

THE WITNESS: We were interested in a qualified engineer regardless of sex.

THE COURT: Yes, I understand, Mr. Imandt. But I asked you whether or not you used the boxes on the sex preference?

THE WITNESS: On second thought, I don't think I did.

THE COURT: You don't think you did?

THE WITNESS: No.

THE COURT: Do you remember one way or the other?

THE WITNESS: Not definitely, no.

THE COURT: In other words, if I understand you correctly then, you viewed her complaints about discrimination based on sex as being without basis; is that it?

THE WITNESS: Right.

THE COURT: And she was complaining, I gather, about it more than just the one area that she was working in. She was speaking about a plant-wide condition to you, is that right?

THE WITNESS: That was her philosophy, yes.

THE COURT: Her philosophy?

THE WITNESS: That women were discriminated against and not given the opportunity.

THE COURT: You say that is a matter of philosophy?

THE WITNESS: Yes.

THE COURT: What do you mean by that?

THE WITNESS: I guess she was overimpressed with the fact that this was the case throughout industry, not just Western Electric.

THE COURT: What do you mean "overimpressed"?

THE WITNESS: Perhaps that was not the right word. It was deep in her mind and she never missed an opportunity to bring up a point on it.

THE COURT: When you say "her philosophy", then you mean the fact that she pointed out that in her view women were disadvantaged?

THE WITNESS: Yes.

THE COURT: At Western Electric?

THE WITNESS: Yes.

THE COURT: And, indeed, in American industry?

THE WITNESS: Yes.

THE COURT: Did you view that as a claim without basis?

THE WITNESS: No, because I would have to agree with her to a certain extent, that throughout industry this was the case.

THE COURT: Then when you say "a matter of philosophy, chip on the shoulder," and the like of that, are you meaning to imply that she was being irrational or unreasonable about it?

THE WITNESS: I would say she was to the point of being irrational about it.

THE COURT: You mean she was concerned about it to the point of irrationality?

THE WITNESS: Right.

* * *

(Tr. 3418-3425)

Again, the objective evidence confirms the accuracy of Kyriazi's complaints to Imandt. It is interesting to note that the Kyriazi-Imandt confrontation concerning sex discrimination at Western began in early 1968 and carried forward throughout that year. The evidence in this case establishes that as late as 1974, six years after her protests to Imandt, and some three years after Kyriazi had been fired these sex preference personnel forms remained in full use at Western:

Summary of 1974 Requisitions Containing Sex Preferences

There were 9 Section Chiefs or Department Chiefs requested. All requests were for males.

There were requests for 12 Craftsmen. 11 requests were for males; the 12th was for a female Waste & Water Treatment Operator.

There were 23 requests for Grade 37 openings. All requests were for males.

There were 41 requests for Grade 36 openings. All requests were for males.

There were 61 requests for Grade 35 openings. 60 requests were for males; 1 request was for a female.

There were 85 requests for Grade 34 openings. 76 requests were for males; 9 requests were for females.

There were 60 requests for Grade 33 openings. 52 requests were for males; 8 requests were for females.

There were 96 requests for Grade 32 openings. 9 requests were for males; 87 requests were for females.

All 500 series Clerical requests were for males.

All 200 series Clerical requests for grades 209 and above were for males.

Not all organizations shown on the requisitions were listed by Western in its answers to Interrogatories.

(Exhibit P-114).

It is, therefore, plain that Kyriazi's complaints to Imandt about the status of women at Western in general, and her condition in particular, were not the product of an irrational mind. We also consider some of this evidence *infra* in dealing with Western's contentions that Kyriazi is not a satisfactory representative of a class comprised of all female employees at Western.

As a result of her confrontations with Imandt beginning in early 1968, Kyriazi attempted to transfer out of his department to work with computers in Information Systems. There is ample evidence in the record that those in authority in Information Systems told Kyriazi that they had no openings; they in fact did not want her; that she had been "turned down" both by Department Chief Wilser (Exhibit D-74b), and by Wilser's boss, Assistant Manager Wertz. "Imandt contacted G. C. Wertz to see if he would *reconsider* taking her into his organization. He asked to see her personnel records, which were given to him. After reviewing these records *and discussing the situation with J. Wilser* he concluded he could not find a place for her in his organization." (Exhibit D-74(b), emphasis added).

The evidence is clear that Wilser and Wertz did not take Kyriazi but not because there was no opening for her. (Tr. 2604-6, 3400; Exhibit D-74(b) page 3). In fact there were such openings. (Tr. 4534).[22]

It is impossible, looking back years later, to determine whether Wilser and Wertz did not want her because she was a woman or because Imandt had reported that she was a troublesome woman,[23] but it is plain that she was not wanted

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22. The following people were in fact hired or transferred into Information Systems in 1968 or at the beginning of 1969:

P-145 S.T. Liu (hired)
P-149 E. Stewart (hired)
P-214 P. Crefeld (transferred)
P-147 R. McCauley (transferred)

23. As Imandt's memo notes:

> This discussion, much the same as had previously taken place with R.J. Imandt ended by his asking her specifically what she wanted. He told her that before she could be placed anywhere that there had to be takes [sic] which to date we had been unable to find. Although she apparently wants to [sic] into the computer field she really wants Systems work and not programming.
>
> She left with the understanding that she would think over the situation and try to be more specific in what she wants.
>
> She was again impressed with the fact that there had to be an opening before any move could take place.
>
> Throughout the foregoing discussions Miss Kyriazi expressed disdain for former Industrial Engineering

(Cont'd)

and that she was put off by them on the false ground that there was no available opening.

This situation with Imandt continued throughout 1968. Finally, in December, Kyriazi went to Imandt's boss, McCaffrey, Assistant Manager of Industrial Relations, requesting to transfer to Wertz's organization in Information Systems. Imandt then prepared a letter for McCaffrey's signature, in order to arrange a transfer to Information Systems. That letter (Exhibit P-177) begins as follows:

> Miss K. Kyriazi, an Industrial Engineer with 34 months experience in our organization, has expressed a desire to be transferred to an area where she can make more effective use of her educational background in the field of computers, economics and statistics.

There then follows her curriculum vitae, including her three degrees. Of her service with Western at Kearny, the letter reports

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(Cont'd) supervisors to whom she had reported. She feels that they were not cognizant of her abilities and would not trust her on an assignment equal to those abilities in part because she is a woman working in what is generally a field for men. She is sure of her management capabilities and is very forceful in expressing this opinion.

> One of her major drawbacks is her inability to make herself understood because of language difficulties. When this is discussed with her she disagrees and indicates that the reason people cannot understand her is that they are intellectually inferior.

(Exhibit D-74(b)).

> . . . she was transferred to Kearny as an Engineer in the Industrial Engineering Organization where she is presently employed. During this period she has performed satisfactorily as an Engineer associated with Wage Incentives, Maintenance and Administration of Inspection and Merchandise Incentives.
>
> Character of Work—Present Assignment:
>
> In her present assignment, *Miss Kyriazi has demonstrated ability to organize her work effectively and promote good relations with the organization for which she is responsible for setting Wage Incentive Rates.* She has developed a computer program for setting rates for the Box Shop in the Merchandise Organization. It is recommended that you review this employee's qualifications for openings in your organization.
>
> G.L. Mc Caffrey—3210
>
> (Emphasis added.)

This memo was sent to Assistant Manager Wertz on January 8, 1969 and it was arranged for Kyriazi to be interviewed by Wertz.

At trial it was Kyriazi's testimony that at that interview Wertz insulted her and made it plain to her that he did not want "girls" because "they got married and pregnant." (Tr. 2250). She testified to similar treatment from one of Wertz's subordinates, Mr. Greco, with whom Wertz had arranged a follow-up interview. (Tr. 2251-3). At trial, both Wertz and Greco emphatically denied this.

Kyriazi's version does have corroboration. It is undisputed that *immediately* following her interviews with Wertz and Greco, she went to their superior, T. Arthour, and complained about the treatment she had received:

> Q. [MRS. VLADECK] What did you do after you had left Mr. Greco's office?
>
> A. I told him that I don't consider this a regular interview and I have to see someone higher in management.
>
> So I left his office and I went directly and I saw the second Supervisor from the top, Mr. Arthour.
>
> Q. Is that A—
>
> A. A-r-t-h-o-u-r.
>
> * * *
>
> THE COURT: Let me see if I understand you, Madam.
>
> THE WITNESS: Yes.
>
> THE COURT: You went immediately to this Mr. Arthour to consider about what Mr. Greco had said to you; is that it?
>
> THE WITNESS: It was a combination of what Mr. Wertz and Mr. Greco—I mean, I went to

> complain because Mr. Wertz and Mr.—who was the Assistant Manager, and Mr. Greco, who was one of the Department Chief, they were telling me that they don't want girls.
>
> THE COURT: I mean, that's the purpose—
>
> THE WITNESS: The treatment; yes, sir.
>
> THE COURT: —you went that very day?
>
> THE WITNESS: Immediately. Because it was not so usual and I was trying for a year for this transfer.
>
> * * *
>
> A. Well, I told him that "Mr. Arthour, for a year now I try to be transferred to the Information Systems and Mr. Imandt is telling me that he makes contacts, the necessary contacts, but he cannot find any opening for me, while I know that they hire and they transfer employees to this organization."
>
> Then I described to him my conversation with Mr. Wertz and my discussion with Mr. Greco. And I told them that, "At least you should warn them not to be so explicit about speaking about girls and not wanting them; and things like this. So I would greatly appreciate if you would intervene and to let me transfer."

He immediately did the transfer and he told me that he's going to order all the applications of the women who had applied before, and they were not processed, to be processed, and have more women hired in the Information Systems.

Q. [MRS. VLADECK] Had you told him that there were applications of women that were not being processed?

A. Yes. Because Mr. Wertz told me.

Q. Now that was during your initial interview with Mr. Wertz?

A. Yes.

Q. I didn't hear you tell us that. What had Mr. Wertz told you about other women's applications?

* * *

A. He told me there is no future for a woman in his organization and he gave me the example of two programmers, two women programmers who left his organization because they realized it.

After that he told me that "After all, we have a lot of applications from women but we don't even process them."

Q. And it was that that you reported to Mr. Arthour?

A. Yes.

Q. Was that part of your conversation with Wertz that you were referring to?

A. Yes.

Q. Now, you say Mr. Arthour ordered that you be transferred?

A. He was upset, obviously, and he told me not only are you going to be transferred, but I'm going to give an order that all these applications are going to be processed as quickly as possible.

Q. How long after the conversation with Mr. Arthour were you transferred?

A. Immediately. Immediately.

* * *

(Tr. 2254-2259)

Kyriazi's account of her interviews with Wertz and Greco is corroborated by notations made by her Assistant Manager McCaffrey on a document found in the files of Western. Thus, plaintiff's Exhibit P-177a contains handwritten notations initialed "G.L.M." which are McCaffrey's initials. The notations set forth the schedule of Kyriazi's interviews in Information Systems as follows:

Interviewed by

Wertz	1/20 & 1/23
Bagden	1/20
Hayes	1/21
Greco	1/22

The handwritten statements continues:

As a result of these interviews she spoke to T. Arthur on 1/22. Not satisfied with interview by Greco. Arthur promised her he would do something. Aslo Wertz's second interview was to apologize for the treatment she was getting in her interviews by computer supervisors.

This document substantially corroborates Kyriazi's claim that she made an immediate and timely complaint about the conduct of Wertz and Greco, and the immediacy of that complaint fully corroborates her claim, at trial, that she had been abused by both men. Having heard all three witnesses—Kyriazi, Wertz and Bagden—and having reviewed the documentary evidence, the Court fully credits her account.

Such was the background of the inauspicious beginning of Kyriazi's employment in Wertz's organization. Wertz assigned her to work for Department Chief Wilser who, we have seen, had initially rejected her nearly one year earlier.

From her earliest contacts with Wilser, on through her interviews with Wertz, Bagden and Greco nearly a year later, Kyriazi made it plain to supervisors in Information Systems that she desired and was equipped to do work as a systems designer rather than the less sophisticated work of a programmer. (Exhibit D-74b). At trial there was substantial dispute concerning the terminology of these two endeavors—designer or systems engineer versus programmer—but suffice it to say that the Court is satisified that there is a difference in the level of

functions between the two and that Kyriazi, to the annoyance of her superiors, felt that she was qualified by reason of her education for the more sophisticated computer work.

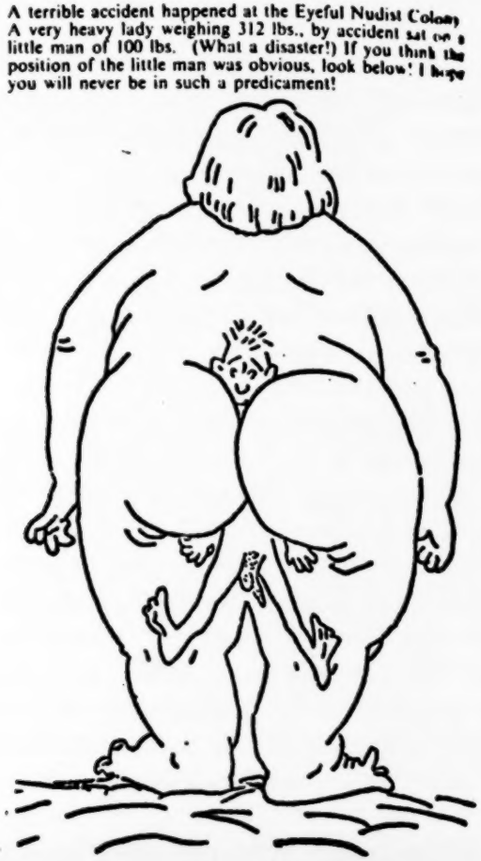
It is apparent that Kyriazi was sensitive that at Western there was a difference in the level and the nature of the work assigned to men and women employees, and that she was *determined* that such artificial sex based classification should not be applied to her. It is also apparent that her perceptions were not the manifestations of a disordered personality, as Western would have it, but the product of perceptions which were, in terms of the working conditions of females at Western, essentially accurate.

Immediately upon her assignment to Wilser, who was located on the 5th floor, Wilser sent her to the 3rd floor to work under the supervision of a fellow department chief, Ralph Boyd. Her assignment, on its face, was to act as a liaison between Wilser's and Boyd's departments in connection with a project then being run by three men within Boyd's department: James S. Snyder, team leader; and Robert Armstrong and Shen Tai "Teddy" Liu. Her experience with these three men form the core of her claim for tortious interference with her work.

It was Kyriazi's testimony that these three young men teased and tormented her. That they made loud remarks concerning her marital status, and trumpeted their speculations and even made wagers concerning her virginity. According to Kyriazi, they would tease her by deliberately blocking her path as she tried to move in the aisle. This harassment, she testified, spilled over into her working relationships with them, where they treated her with contempt and ridicule and attempted to denigrate her position as a professional. The three men concerned each testified and denied any such actions on their part. To the contrary, it was their testimony that it was she who

harassed them and that, as a professional, her work was substandard and inept.

Again, we have a piece of objective evidence which sheds light on the controversy. Before we deal with it, however, it is necessary to give a physical description of the plaintiff. She is a very large woman, and, as she testified, weighs nearly 200 pounds. It was her testimony that, as a part of the attempt by these three co-workers to humilate her, they created an obscene cartoon and that she saw Armstrong place it on her desk. She retained a copy of this cartoon, and it was received in evidence as Exhibit P-138:



It was Kyriazi's testimony that she well understood that this cartoon was designed to embarrass and to humiliate her, *as a woman.* Western, while certainly not denying the existence of the cartoon, challenges her perception of the direction of the cartoon's thrust, claiming that "it is the man at whom the cartoon is aimed." (Def's Pr. Finding No. 940(a)). However, a mere glance at the cartoon and its inscription, along with what we know to have been the relationship between the parties, demonstrates the implausibility of Western's assertion. It is obvious to the Court that this cartoon was created, disseminated and ultimately thrust upon this plaintiff to humiliate her *as a woman.*

Kyriazi testified that she saw Armstrong place it on her desk. Armstrong denies it. He claims to have found it in his desk and passed it on to Snyder. He claims not to have understood it at the time. His testimony is corroborated by Liu, who claims to have found it on his own desk, and then to have placed in on Armstrong's, and even to have seen Armstrong place it on Snyder's. Snyder claims that he found it on his desk and threw it in the trash where, presumably, Kyriazi is supposed to have fished it out. All three men deny any knowledge of the source of the cartoon.

The Court does not credit the testimony of these three men. There can be no doubt that this indecent drawing was created—exactly by whom we cannot now ascertain—and passed around by all three men to humiliate the plaintiff. It may indeed be true, as they claim, that the plaintiff was not at all that she should have been as a programmer—certainly the Court is not prepared to find that she was as perfect as she claims—but the Court finds in Exhibit P-138 an indecent attempt to humiliate plaintiff as a woman as part of an overall effort by them to make life generally unpleasant for her.

The Court further finds that Western supervisors at Kearny—Wertz, Boyd and Wilser—were well aware of this harassment to which Kyriazi was subjected, but that they chose to largely disregard her complaints and totally failed to take any action against the men who harassed her. This, the Court finds, exacerbated the situation. Aside from the implicit encouragement of such harassment which the superiors' knowing disregard engendered in Kyriazi's male co-workers, such conduct by her superiors was infuriating to Kyriazi, and justifiably so. When they totally disregarded Kyriazi's complaints about the cartoon, and the boisterous speculations about her virginity, she was left with the understanding that her superiors were discriminating against her and in favor of her male co-workers.

While the three superiors do not deny that the cartoon was disseminated in or around April of 1970, nor that they made no inquiry into these matters until August of 1971, three months before Kyriazi was fired, they each deny that Kyriazi complained to them in the spring of 1970.

The Court finds that Kyriazi did complain to her superiors in the spring of 1970. It is plain that she did not take this treatment supinely, but vociferously and repeatedly complained. Not only did she complain to Boyd, for example, she even complained to his secretary, Ms. Allen, and Ms. Allen testified that she herself told Boyd about the obscene picture and just how upset Kyriazi was. (Tr. 4713-14). Indeed, on October 1, 1971, in a joint interview of Kyriazi by Wertz and Wilser, which was recorded by Wertz, in which Kyriazi was given a last chance before termination, Wertz said in response to Kyriazi's complaints about Armstrong, Snyder and Liu:

> . . . you complained and *we* as soon as *we* knew about it *we* took action and we moved you. Now, this was more than a year and a half ago.

(Exhibit D-225(a); Wertz, p. 23) (Emphasis added).

It is plain that Wertz, during this conversation, acknowledged the receipt of Kyriazi's complaint, and explained what he did to solve her problem; moving her from Boyd's group on the third floor back to Wilser's on the fifth floor. His attitude towards her complaints was simply that a woman must expect such things in a man's world. Perhaps his attitude is best expressed in his own words, also tape recorded during the interview on October 1, 1971:

> Cleo: [KYRIAZI] No, it's not correct, sir.
>
> GCW: [WERTZ] It's, it's maybe it's cruel humor . . .
>
> Cleo: And when when . . .
>
> GCW: . . . but I would accept it as being . . .
>
> Cleo: . . . and when, last month, let's say, which aggravated me again, I met the fellows on the aisle. They said: "Come now, have it easy, Jim Snyder is not the old one. He's changed. Now, nobody bothers you. Let's leave". Let's leave? But Teddy Liu is B+ and I am C+ and I have seven years and I have worked. Everybody's laughing with me, you know. I don't have . . . Do you think that I have any prestige like before around here? Do you think that anybody's going to respect me like before?
>
> GCW: Cleo, only. . .

Cleo: For me the only thing is to . . .

GCW: . . . what you are doing to yourself.

Cleo: . . . to go out. This is the only solution.

GCW: I don't think it's the only solution.

Cleo: Yes, sir. Because nobody would respect me. Who young man now can respect me if he knows that he can call me *if I'm a virgin or not?* You know, give *dirty pictures* and go through with this. And this *dirty picture* it was *a continuation of their discussion about the subject which we are discussing now* that I told.

GCW: *I tracked that down as well as I might and . . .*

* * *

(Exhibit D-225(a), page 27) (Emphasis added).

GCW: We moved you to the fifth floor.

Cleo: O.K. Sir. Forget about me.

GCW: We corrected that situation. Can't you put it to bed?

(Exhibit D-225(a), page 47).

GCW: Cleo, only because you are the one, *you brought this up in my office here at least a dozen times in the last year and a half.*

Cleo: Sir, if I didn't bring this, you would still have me, you know, have the opinion which you had at the beginning. You remember what you told me?

GCW: What?

Cleo: *You told me that I should be complimented that these young that young men pay any attention to me and these boys they are making a horse play, you know.* And, therefore, Mr. Wilser told me, I told him "Am I a silly woman?" And he said, "In a way." So if I didn't insist, you would still have the old opinion for me.

GCW: *The things that you mentioned, Cleo are things that happened in a man's working world every day in the week.*

Cleo: No, no, no, no sir!

GCW: *Yes.*

(Exhibit D-225(a), page 48) (Emphasis added).

What emerges from all of this is that in April and May of 1970 Kyriazi did complain to her superiors about the sexist conduct of her co-workers as she claims she did; that they made no effort to investigate her complaint; that she was regarded as an oversensitive woman who should be expected to meet and endure all this in "a man's working world." Wertz's later statement to her that he had tried to "track down" the comments about her virginity and the origins of the obscene picture, that he had moved her to the fifth floor to help her were both outright falsehoods.

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The fact is that no attempt was made to investigate her complaints in April, May or June of 1970, before she was moved. Indeed, her superiors now take the position that they then knew of no such complaints. The only investigation that occurred was in, as we shall see, August of 1971, shortly before her termination, which was motivated by their desire to clean up the record. As to her move from the third floor to the fifth floor in June of 1970, this was done at Boyd's request because of *his* complaints about *her* failure to get along with her co-workers. (Exhibit D-77).

The Court finds that in June of 1970, Boyd, Wilser and Wertz, with full knowledge of her complaints, removed her based on their own conclusion that she was unable to get along with Snyder, Armstrong and Liu. Boyd, continuing the tradition begun by Imandt, prepared a confidential "Memorandum for Record". This Memo, Exhibit D-77, ultimately incorporated in Kyriazi's personnel record, was used in part to justify her ultimate termination (Exhibit D-109), and is a deliberately false and one-sided account of the relationship between Kyriazi and her male co-workers.[24] That Kyriazi's supervisors should, in

24.

June 15, 1970

MEMORANDUM FOR RECORD

Circumstances leading to Miss Kyriazi's change in physical location from the third floor (17-3) to the fifth (20-5):

Miss Kyriazi was temporarily loaned to this organization to develop a statistical sampling technique as a part of the Kearny Works Inventory Control Systems (KWIC). This required close liaison with development personnel in 3451.

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(Cont'd) As the project developed, Miss Kyriazi became incensed with the employees she came in contact with and on two occasions flew into a rage and left the area. Both of these outbursts occurred when supervision was temporarily out of the area.

The underlying cause of the friction is Miss Kyriazi's failure to accept guidance and direction or even suggestions, from others. She felt she was being tricked or deliberately mislead [sic] by her project leader and associates.

For example:

1. Miss Kyriazi had a card misplaced in her program deck and the computer test of the program completed. From that point forward she felt that the misplaced card was needed to complete a test.

2. Computer programs require Job Control Language Cards in order to submit the program to the computer for testing. The department Technical Coordinator tried to assist Miss Kyriazi in making up these cards and, when later the test did not complete, she felt that he tried to make her look bad and had deliberately sabotaged her job. She would not permit anyone to review her logic. In reality, it is quite normal to have minor errors embedded in both JCL Card and program logic during the initial stages of testing.

Continued reoccurrences of incidents of this type caused a completely intolerable situation surrounding Miss Kyriazi's presence in this organization.

Subsequent discussions were held between Mr. F.A. Wilser and the undersigned and it was felt that the project no longer required close liaison with 3451 employees and, for the good of all concerned, Miss Kyriazi should move to her department on the fifth floor.

Original signed by
R.S. BOYD, JR.—3451

RSB: MBS
(Exhibit D-77).

1971, represent that she had been moved in 1970 to save her from the harassment of co-workers, while knowingly placing in her records a memo attributing the move to her unjustifiable rages and failures to accept guidance is, at least to this Court, grotesque.

Wertz's attempt to "track down" the insults to Kyriazi were, the Court finds, non-existent. Neither Armstrong, Snyder nor Liu were ever questioned by any supervisor about any of these incidents until shortly before Kyriazi was fired. Even then, they were questioned only because Kyriazi kept complaining to her supervisors. She felt that she had been unfairly treated by them. She felt that this unfairness spilled over to the way in which they appraised her work, graded her performance, failed to promote and even underpaid her. Her supervisors, for their part, continued to make their private memos for the "record" as they documented a case against her.

Thus, when Kyriazi made one of her frequent complaints to Wertz concerning her treatment, including promotional and salary, Wertz made a private memorandum for the record:

(PRIVATE)

August 5, 1971

MEMORANDUM FOR RECORD

Re: Kyriazi, Kyriaki

Miss Kyriazi stopped at my office at 9:30 a.m. with the question of what I had heard relative to her conversation with Mr. Clark. I told her that I had heard nothing.

She said that she could not stop with the people who had wronged her. I asked who she referred to, and she replied that it was those silly boys on the third floor. She then said if it could not be settled here it would be settled outside. I asked what she meant, and she said *she referred to the courts.* I then suggested it was difficult to come up with an answer to a question which is not clear, since I had assumed that her grievance was one of disagreement with management's performance appraisal of her. She replied that it was both this and the harassment which occurred on the third floor. I told her I considered this matter closed because corrective action had been taken in June, 1970, to move her to the fifth floor after she had complained to me. She nodded agreement, but added that one is now an engineer, one is an "A" and one is a "B+". I indicated that if her information was correct, which I doubted, it had no bearing on either of her questions, and I would not discuss other individual appraisals with her.

Miss Kyriazi then asked if it was true that a Member needed to be appraised outstanding for 2½ years before qualifying for Senior. I reminded her that she had asked me that question twice before, and that in order to qualify for promotion to Senior, a Member required a minimum of two years appraisal as outstanding. Miss Kyriazi asked me what I was doing about it. I told her I was doing nothing about it. We moved her from the third to the fifth floor in June, 1970, to eliminate a personnel relations

irritation *which she complained about at that time*, and we reviewed her rank order and appraisal earlier in 1971 when she expressed dissatisfaction with it. Our conclusions were that the "B" appraisal is correct. She guessed that management had to protect itself. *I told her that management had nothing to protect in this case.*

I suggested that nothing further could be gained by continuing the discussion. She agreed and left.

Original Signed by
G. C. WERTZ

G.C. WERTZ—3450

GCW:MBS

(Exhibit D-92) (Emphasis added).

This memo is important for several points. First, it again demonstrates that Kyriazi did complain of harassment in the spring of 1970. Second, it demonstrates that her supervisors knew that she intended to sue. In spite of Wertz's notation at the end that management "had nothing to protect in this case", he ordered Boyd to conduct an inquiry into her claim that she had been harassed by Snyder, Liu and Armstrong. This order was not motivated by any concept of justice, but instead by a desire to clean up and protect the record in light of Kyriazi's professed intention to sue.

Boyd dutifully caused an inquiry to be made, and made a *written* report to Wertz, obviously for the "record". For *the first time*, Armstrong, Snyder and Liu were interviewed, *but Kyriazi*

was not. Based upon this "investigation", Boyd accepted their account. No effort was made to find the source of the cartoon. No mention was made of the jokes concerning Kyriazi's virginity. The record having been made, and the company protected, the memo closes with Boyd denying that the cartoon incident was brought to his attention.[25]

25.

August 10, 1971

Mr. G.C. WERTZ—3450
Re: Cleo Kyriazi
Two episodes continue to crop up in discussions with Miss Kyriazi:

1. Obscene Picture: It is the understanding of the undersigned that these events lead [sic] to Miss Kyriazi's possession of the picture. The picture was placed by parties unknown on the desk of an employee next to Miss Kyriazi. Miss Kyriazi saw the picture and became very upset. (She apparently felt that it was directed at her.) The picture was thrown into the waste basket by another employee. Later, Miss Kyriazi demanded to know the whereabouts of the picture, searched waste baskets, and retrieved it for her file. At no time was the picture given or even directed towards her.

2. Test coordinator: It was the policy of this organization to pick up tests from the I/O center each day. This job was assigned to each employee in turn for one week. The only exception was the project leader. Miss Kyriazi was assigned a three-day week and still felt that this was beneath her station because the project leader was not participating in the job. She felt she was being tricked into doing menial work for others.

(Cont'd)

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It has been necessary to delve into a detailed factual analysis in order to pierce a cloud of self-serving memoranda, prepared by supervisors who anticipated litigation, and who were preparing for it even while they led Kyriazi to believe that they would meet her problems and continue her employment. What emerges is a picture of a woman who in fact was angry, who did in fact accost her superiors, and who did eventually become difficult to deal with. The fact is, however, that these manifestations, unpleasant and even intolerable in the normal working relationship, were understandable and even justifiable given their provocation.

Kyriazi felt, and the record supports her, that she was treated neither fairly nor regarded seriously by her male co-workers and superiors. This she found infuriating. There is no doubt she responded in kind, and that this caused a further deterioration in her position. When her male co-workers jested over her virginity, or the lack of it, she responded by terming one of them a homosexual. She had no right to do that; she was, as she should be, reproached for such conduct. But Wertz and Wilser, who were so outraged at her having called a *male* employee a homosexual, cared nothing for sexual taunts directed at a *female* employee. These they said should be expected in "a working man's world."

When Kyriazi was brought face-to-face with Wilser and Wertz in the tape-recorded conversation of October 1, 1971, and

(Cont'd)

At the time, these two incidents were not brought to the attention of the undersigned.

R.S. BOYD, JR.—3451

RSB: MBS
(Exhibit D-92) (Emphasis added).

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was confronted with the claim that she made derogatory remarks about her male co-workers, she replied that she was merely responding in kind. Wertz then suggested that she was suffering from a "mental disability". Shortly before the meeting, Wertz had made an appointment with the company doctor—a general practitioner—because he felt Kyriazi needed psychiatric attention. She put aside this suggestion, indicating that she thought her supervisors needed that attention more than she. Wertz was careful to note this conversation in yet another "memorandum of information", labeled "private". (Exhibit D-96).

By October 1, 1971, Wertz's resolve that Kyriazi undergo psychiatric examination had hardened to the point that he made it a condition for her remaining at Western:

> GCW: The fourth point I want to make, Cleo . . .
>
> Cleo: Yes, sir.
>
> GCW: . . . is your maligning of other people.
>
> Cleo: Maligning? What is maligning?
>
> GCW: Maligning. That means, in your terms, being disrespectful of their characters, of their talents, of their morality. You have even gone so far as to refer to someone else as being a homosexual.
>
> Cleo: Well this is . . .
>
> GCW: This is maligning an individual . . .

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Cleo: I don't mal-

GCW: . . .particularly if it is not true . . .

Cleo: I'm not . . .

GCW: . . .which it very probably isn't.

Cleo: . . .maligning anybody, sir, because it was something which downstairs Bob Armstrong and Teddy Liu used to joke around and poke their ribs and laugh. I'm not, I don't know about these things and I'm out of everything and this is the reason I was telling you. I (inaudible).

GCW: *What they have done hasn't bothered me, Cleo.*

Cleo: *Well, it bothers me.*

GCW: But they have not referred to someone else as being a homosexual . . .

Cleo: Well

GCW: . . . you have.

Cleo: Well, excuse me, *am I a virgin or not*? If they have the right to discuss of this, why I should not have a right to counter-attack and cover myself. Do you understand?

GCW: No, I don't understand, Cleo.

Cleo: Well, I understand myself. And nobody use to to cover me. This is the reason I wanted to move from

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down because I am not born to live around in such a an environment. This is the reason sir . . .

GCW: Cleo, *but this happened* . . .

Cleo: . . . it came to my nerves.

GCW: . . . *a year and a half ago* . . .

Cleo: No no it runs after me.

GCW: You have been moved to the fifth floor.

Cleo: It runs after me sir. It runs after me.

GCW: Well, Cleo it has not come to my attention but it has come to my attention . . .

Cleo: Sir, I told you one thousand times my, whatever I say come to your attention and whatever these young men did to me for a long period of time didn't come to your attention. What else you want me to do? If I didn't speak, loudly, sir, by now, they would have me down playing like a ball with me.

GCW: Cleo . . .

Cleo: But it is not my morality.

GCW. . . . *you complained and we as soon as we knew about it we took action and we moved you. Now, this was more than a year and a half ago.*

Cleo: This was after me, sir. You moved me out physically but you didn't cut my links. This is my organization, sir. I'm working with them.

* * *

(Exhibit D—225(a), pages 21-23).

GCW: I'm talking about what has happened within the last month. You have referred . . .

Cleo: I'm repeating.

GCW: . . . to other employees about another employee's being a homosexual.

Cleo: You're wrong. I didn't say this. I say, in all probability. And it was what down they informing me. For this reason I wanted to move out and for this reason you saw me fighting like a fish in a net. Go out. What is my life?

GCW: Cleo, you have been out for over a year and a half. You are doing this, this month, now.

* * *

(Exhibit D—225(a), page 30).

GCW: Well, it's more than that, Cleo, and that's why we're in here this afternoon. I mentioned four points and the fifth one I hesitate to mention but I'm going to mention it because *we have*

mentioned it to you before and we are not psychiatrists, we are not medical people, but just as friend to friend . . .

Cleo: Yes, sir.

GCW: . . . we have advised you in fact I scheduled a meeting with our Medical Department which you . . . declined to accept and you have ignored our suggestions to get medical and psychiatric help. We feel you need help.

Cleo: Really? This is your opinion sir?

GCW: This is simply my opinion and the opinion of our supervision generally.

Cleo: Really? Why you don't get the other people around me to get a psychia psychiatric help? What is wrong?

GCW: We're discuss discussing you, Cleo.

Cleo: Really me? I'm discussing you at the same time.

GCW: I . . .

Cleo: We are discussing ourselves, sir. O.K.?

GCW: All right, let me let me answer your question.

Cleo: Yes, sir.

GCW: If you're directing it to me, and I accept your question. Why don't I get psychiatric help instead of you.

Cleo: No.

GCW: Well, if this were anyone else, all right?

Cleo: Yes, because—

GCW: If I was in a position . . .

Cleo: Yes.

GCW: . . . *of suspecting that my supervisor and his supervisor was having people spy on me, all right? If I was felt it necessary to disrupt the people around me by talking about the way the Company had injured me and my problems with the Company and if I felt it necessary to malign my fellow employees by suggesting that they are homosexuals.*

Cleo: You are wrong. I didn't say this.

GCW: . . . I would search our medical help, Cleo.

* * *

GCW: Could you let me finish, please.

Cleo: And you are men and you should not have done this to a woman. This is what's killing me.

GCW: That is my fourth point and fifth, Cleo. *If you do not take our advice and seek medical treatment or psychiatric treatment, I feel it will be necessary to terminate you.*

Cleo: *Do as you like, sir.*

* * *

GCW: Everybody, none of the things that I'm talking about here show any disrespect for you. These are actions that you are taking showing disrespect for other people, your supervisor, other supervisors, the people around you, other employees on the third floor.

Cleo: You are wrong, I never . . .

GCW: A disrespect for good jugment, Cleo.

Cleo: Please, bring . . . I'm I'm seven years with Western Electric. Bring someone outside the three boys down who must, I'm scared to death and I suspected of low morality standards for a long time for this reason. It was not my atmosphere and I was trying to move out. Move him out, move these three men out, and Mr. Wilser, you and Mr. Boyd cover it, then, and Mr. Groshans reporting, and I don't have anything else with anybody in the Company.

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GCW: I don't know that you're saying, Cleo . . .

(Exhibit D—225(a), pages 40-45) (Emphasis added).

Although Wertz professed not to understand Kyriazi, her meaning is clear and, when read against the proofs of the case, accurate. It is her inarticulate protest that Boyd, Wilser and indeed Wertz himself had moved *her* from the third floor, even though she had been the victim, when instead they should have removed those who had published the indecent cartoon. It is almost Kafkaesque that Kyriazi was deemed in need of psychiatric attention for suspecting that her superiors were secretly acting against her, when the supervisors' own secretly recorded memoranda reveal that they were doing just that.

In sum, it is plain that Western knew since at least early August of 1971, and probably earlier, that Kyriazi intended to sue it. (Exhibit D—87). Indeed, Kyriazi filed her first charge with the New Jersey Division on Civil Rights on August 24, 1971. From at least early July of 1971 and continuously thereafter, Western supervisors, particularly Wertz, Wilser and Boyd, prepared a series of self-serving and often inaccurate memoranda, with an eye to the litigation which they knew was almost certain to come. It is clear that it was their strategy to depict Kyriazi as divisive, disruptive and close to demented. The ultimatum, on October 1, 1971, that she submit to psychiatric care was designed to force her to leave. When, on November 5, 1971, Kyriazi told Wilser that she had already filed charges against Western (Tr. 2358), and when this was confirmed by a co-worker who had seen the letter (Tr. 2358-9), Wilser and Wertz decided to terminate her. Thus, on November 11, 1971, a memorandum (Exhibit D—109) justifying termination was prepared and transmitted to higher officers of Western. This

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memorandum of justification is a compendium of the memoranda privately prepared by Boyd and Wertz. Indeed, it quotes extensively from Boyd's memorandum of June 15, 1970, explaining the reasons for the transfer of Kyriazi from the third floor to the fifth floor. This memorandum is unfair, one-sided and inaccurate. It mentions nothing of her harassment by male co-workers, her complaints, the obscene cartoon, nor does it refer to Wertz's demand that she seek psychiatric help. The Court finds that Kyriazi has established that she was fired when her employer discovered that she had filed her complaint. While it is likely that she was about to be fired in any case, and that her supervisors were laying the groundwork for that act, her actual termination was triggered by their discovery of her having filed charges.

After her termination Kyriazi found other work. First she joined the Child Development Department of the Human Resources Administration of the City of New York. Her former supervisors, including a former Assistant Commissioner, appeared and testified on her behalf and gave an extremely favorable account of her employment history with their agency. From there Kyriazi went to Group Health, Incorporated, as a systems analyst. The President of that company, Dr. George W. Melcher, who is also an Associate Professor of Clinical Medicine at Columbia University, College of Physicians and Surgeons, testified as to her performance with his company. He testified not only to her exceptional professional competence, but also to her lack of any aberrant personality manifestations which he, as a doctor, would feel required psychiatric treatment or evaluation. Unless we are to believe that Kyriazi became a totally different person when she left Western, the praises given her by subsequent employers both as to her competence and personality are further evidence which discredits the testimony adduced by Western.

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It may be appropriate at this point to note that the Court does not mean to suggest that Kyriazi was a paragon of virtue, nor that she was an easy-going person, nor one possessed of a pleasing personality. Far from it. Having observed her on the stand for many hours, the Court came to the conclusion that she is a determined, demanding and insistent person, and the Court does not doubt that her personality has the capacity to thoroughly infuriate those who deal with her. The militant qualities of her character undoubtedly, and understandably, provoked strident responses. If her aims had been illegitimate, her goals impermissible or her complaints without merit, her summary dismissal on November 19, 1971, and her physical removal on thirty minutes notice would have been understandable. But the fact remains that her protests were over real and not imagined wrongs, and that she had every right to remain steadfast and to refuse to bow or even to bend. It often happens that progress and victories in the struggle for human rights are made by those who are strong enough to endure the struggle. A weaker, more pleasant, less demanding person than Kyriazi might well have capitulated some principle, and survived at Western. But the law does not impose such a duty on anyone.

One last aspect of Kyriazi's individual case remains: her claim that while at Western her supervisors unfairly and discriminatorily rated her, denied her raises and withheld promotions from her. This subject leads us to the edge of a consideration of damages, which the Court will reserve for the second stage of trial.

Kyriazi claims (Pltf's Pr. Finding No. 316), and the Court agrees, that Imandt improperly rated her work "C". We have already found that, at least in part, Kyriazi desired and finally obtained a transfer from Imandt's department because of his discriminatory attitude.

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Kyriazi also claims that from the time she entered Wertz's department, in early 1969, until the time she was fired, in late 1971, she was improperly rated. In December of 1969, when Kyriazi received her rating, she was placed at the bottom of the "B" group. (Exhibit P—154, 12/1/69). In 1970 Kyriazi was told that she was rated B+. Western denies she was ever so informed, and on the June 1, 1970 appraisal sheet rates her a "C". Within a month, however, and after her protests, this rating was changed to "B+".

Rating is a critical factor in determining salary at Western. A professional employee's salary is determined by the rating of an employee and the age or length of service of that employee. The evidence established that Wertz, Wilser and Boyd rated Kyriazi lower than her worth, and moreover, that even under Western's own computation, she did not receive the salary to which her age and unduly low rating would have entitled her.

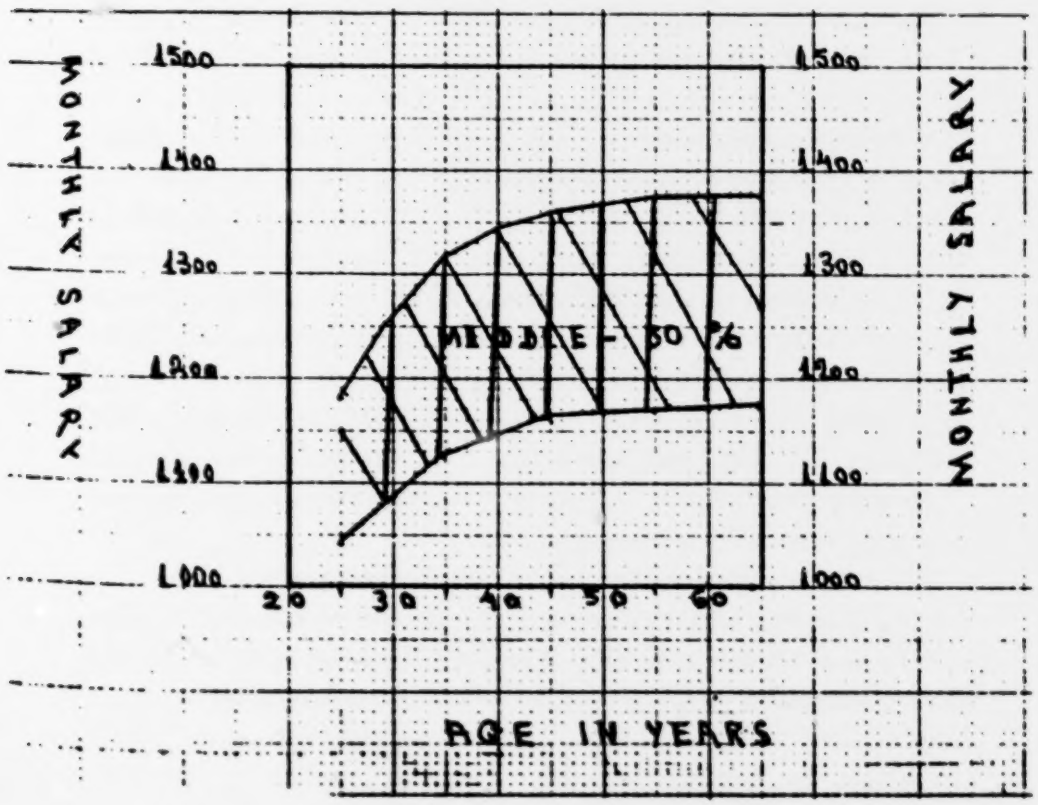
As to the first matter, it is most difficult for the Court, years later, to fix with precision the grades which Kyriazi should have received in 1969, 1970 and 1971. She claims to have been an "A". The company claims she was a "C", but surely never more than the bottom of the "B's". The rating of an employee's work is largely subjective; it rests almost entirely on the impressions of supervisory personnel. Where the evidence indicates that supervisors are conscientiously and fairly attempting such evaluations, their conclusions are entitled to great weight. Subjective preceptions will vary. A perfect evaluation is not required, even if it were attainable.

But when, as here, an employee has demonstrated that her supervisors were unlawfully discriminating against her, then their ratings and rankings are no longer presumptively valid. It falls upon them, in such circumstances, and upon their employer, to demonstrate the *bona fides* of low rankings awarded by supervisors with a demonstrable bias. No

satisfactory evidence in support of the Wertz-Wilser-Boyd evaluations of Kyriazi was offered to the Court by Western.

Kyriazi did offer evidence, which the Court finds persuasive, that even under the improperly low ratings awarded by Western, Kyriazi did not receive the salary to which she was entitled. The Court adopts plaintiff's Proposed Findings Nos. 358-360, 366-376:

> 358. . . . During the period that Kyriazi was at Western, new salary curves for professional employees were published approximately every six months. The salary curve for Information Systems Staff Member, for December 1970, is approximated below (Exhibit P—154):



> 359. On the curve, employees can plot what their salary should be. The horizontal axis represents the employee's age, and the vertical axis represents amount of monthly salary and rating. The cross-hatched portion of the graph is the range in which the middle 50% employees, that is, those who are rated "B", or "above expected", should be paid. Employees rated "A" should be paid in a range above the cross-hatched portion.
>
> 360. Thus, in December 1970, when Kyriazi was 41 years old, and was rated at the top of the B's (or B+) (Exhibit P—154), she could plot her age and rank on the salary curve, and find that her salary should have been approximately $1,345 per month (Kyriazi, 20: 2338); (Exhibit P—154). In fact, her salary at that time was $1,175 (Exhibit P—153). Even accepting *arguendo* the rating given to Kyriazi by Western, Kyriazi was underpaid by Western's own standards (Kyriazi, 21: 2409; (Exhibits P—154, P—91(c)(3), (4)).
>
> 366. Kyriazi appears as the top-ranking B on the appraisal sheet for 11/1/70 (Exhibit P—154, Rank Order 11/1/70). In December 1970, she was given an $80 increase, so that she was paid $1,175 substantially below the approximately $1,345 per month she should have been paid according to age and rating (Kyriazi, 21: 2410); (Exhibit P—154).
>
> 367. Other Information Systems Members were all paid in accordance with their age and rating at

the time of the December increases of 1970. The person with the greatest discrepancy was Kyriazi (Kyriazi, 21: 2409); (Exhibit P—154, Rank Order 11/1/70).

368. Western has a policy of giving generous merit increases to persons who are not paid according to their rating and age (see proposed finding 365, *supra*). Despite the fact that Kyriazi's salary was more out of line than any of the other Information Systems Members, Kyriazi received a smaller raise in December 1970, than six of the males who were rated lower than she, including Armstrong and Liu (Exhibit P—154, Rank Order 11/1/70).

369. Western's policy of bringing a person's salary into line with their rating and age within one year (if not within six months) (see proposed Finding 365, *supra*) was not applied to Kyriazi. In June 1971, Kyriazi received no increase at all (Exhibit P—154, Rank Order 11/1/70).

370. When she complained to her supervisor, defendant Wilser, that others had received raises in June (Sen and Havalchak) while she hadn't, Wilser told her that she was wrong, that nobody received an increase in June, that she was crazy, and that she should have a medical or a psychiatric examination. (Kyriazi, 21: 2445); (Exhibits P—157, P—158).

371. In fact, Sen and Havalchak (Kyriazi, 21: 4444) both received substantial merit raises in June 1971. (Exhibits P—142, P—148).

372. Wilser later claimed that to his knowledge there was no one who got an increase in June who had on the preceding December unless they were out of band (Exhibit D—225(a), p. 32). Out of band means being paid at a lower lever than you should be based on rating and age (Boyd, 29: 3592—3); Exhibit P—91(c)(3)).

373. Neither Havlchak nor Sen was "out of band" the preceding December, and both had received raises at that time, or shortly before. Havalchak received a $75 increase in December 1970 for a total monthly salary of $1,125 (Exhibit P—154, Rank Order 11/1/70). He was 24 years old at the time (Exhibits P—142, P—154). Sen received a $70 increase on 11/1/70 which brought his monthly salary to $1,080. He was 23 years old at the time (Exhibit P-148). Thus, prior to June 1, 1971, Sen and Havalchak would have been placed approximately in the middle of the B band (Sen—$1,080, Havalchak—$1,125). (Exhibit P-154, Rank Order 11/1/70).

374. Using the salary curve of 12/1/70, and plotting the location of Sen and Havalchak on the curve by salary and age, it is found that their June raises put them at the very top of the B range. This is in spite of the fact that in the relevant ranking, those of 11/1/70 (Exhibit P-154, Rank Order 11/1/70, Sen was ranked the lowest of all Information Systems Members in the B range, and Havalchak was rated N.

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375. Thus, in June of 1971, Sen, Havalchak and Kyriazi were situated as follows:

	Age	Rating* 11/1/70	Prior Job Related Experience	Advanced Degrees	Experience With Western	Salary
Sen	24	B-	0	0	1 yr. 2 mths.	1,160
Havalchak	25	N	0	MBA	1 year	1,170
Kyriazi	42	B+	5 yrs.	MBA, MA in Industrial Engineering	6 yrs. 2 mths.	1,175

(Exhibits P-142, P-148, P-153, P-156).

* B+ is used to denote the top of the B range; B- represents the bottom of the B range.

376. Armstrong, who was ranked below Kyriazi in the Rank Order of 11/1/70 (Exhibit P-154) received a salary increase of $125 per month (as compared with Kyriazi's $80 increase) which, in terms of the salary curve, meant that he moved from the bottom of the B range to the top of the B range in one six-month period. Therefore, in December 1970, his salary reflected his age and rating, whereas Kyriazi, after the December 1970 increase, was still earning $170 a month less than she should have been, or almost $2,000 per year less than Western's won [sic] stated policies would mandate.

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However, the Court will not now attempt to fix the rating and rank or salary which Kyriazi should have received while at Western. For although the case was bifurcated only as to the class, the Court has determined to defer the question of the appropriate amount of damages to the second stage of trial. Thus, these determinations will abide the second stage of trial.[26] Suffice it for now to hold that Kyriazi has successfully proved in her individual case that Western violated Title VII by (1) underrating and underpaying her, (2) by denying her promotions, and (3) by terminating her.

XIII. PROPRIETY OF KYRIAZI'S REPRESENTATION OF THE CLASS

Throughout this litigation Western has challenged Kyriazi's right to represent so broad a class. Western, with some merit, points to the disparate jobs and categories which are embodied within the class as certified: from secretaries to wirewomen; from benchhands to engineers. It is true that the class is a very large one. While it has been impossible, because of layoffs and rehirings, to determine the precise number of women who comprise the class, it appears that Kyriazi represents approximately 7,500 women.

Western claims that because Kyriazi's injuries are different from those she invokes on behalf of the class, she cannot satisfy the case or controversy requirement of Article III. Western argues that both Article III of the Constitution and Rule 23 of the Federal Rules of Civil Procedure prohibit a female engineer, whose own claims are limited to discrimination in promotion,

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26. Among the types of relief which will be awarded Kyriazi at the second stage are reinstatement, back pay and retroactive benefits.

salary and termination, from challenging Western's treatment of its female secretaries, wirewomen, and pieceworkers in such divergent areas as layoffs and participation in job training programs.

The Court does not agree with Western that the propriety of class representation is a question of standing under Article III. It is clear that Kyriazi, an "aggrieved party" within the meaning of 42 U.S.C. §2000e-5, possesses the requisite injury-in-fact to permit her to sue. *See, Hackett v. McGuire,* 445 F.2d 442 (3rd Cir. 1971). The question of what claims may be raised by a named plaintiff is not a question of standing as such; indeed, it is the purpose of a class action to permit a named plaintiff to raise the claims of non-parties. Rather, the question whether the claims of the named plaintiff are sufficiently representative of those of the class bears both on the fairness of compelling a defendant to defend those claims and the fairness of binding the class to the ensuing judgment. *See, Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). These precise concerns are embodied within Rule 23(a) of the Federal Rules of Civil Procedure and it is against the requirements of that rule that we must measure the propriety of Kyriazi's representation of the class.[27]

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27. Rule 23(a) provides that:

> *(a) Prerequisites to a Class Action.* One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of defenses of the representative party are typical of the claims or defenses of the class, and (4) the representatives will fairly and adequately protect the interests of the class.

(Cont'd)

The requirements of Rule 23 were recently considered by the Supreme Court in *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). In that case, three Mexican-Americans challenged their employer's practice, pursuant to a collective bargaining agreement, of requiring city drivers to forfeit their seniority in order to transfer to more desirable positions as line drivers. Alleging that they had been denied transfers because of their national origin, but stipulating pre-trial that they had not been discriminated against when they were first hired, plaintiffs initially sought to represent a class consisting of all "Negroes and Mexican Americans who had been denied equal employment opportunities with the company because of their race or national origin," including applicants of such minority groups who had sought positions from the effective date of Title VII. *Id.,* at 399, 97 S.Ct. 1891.

Despite their class allegations, plaintiffs never sought class certification. The district court ruled against them on the merits and dismissed their class allegations. The Fifth Circuit reversed, itself certified a class, and went on to find class-wide liability.

The Supreme Court reversed the Fifth Circuit, holding that plaintiffs were not proper class representatives. First, the Court looked to the trial court's finding that plaintiffs themselves were

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(Cont'd)

> The instant class was certified under Rule 23(b)(2), which provides that in addition to the requirements of Rule 23(a) the named plaintiff must show that:
>
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

not qualified to become line drivers and the stipulation pre-trial that they had not been discriminated against in their initial hire; and held that since it was clear that the plaintiffs "could have suffered no injury as a result of the alleged discriminatory policies" they "were hardly in a position to mount a class-wide attack on the no-transfer rule." *Id.*, at 403-4, 97 S.Ct. at p. 1897. Second, the Court held that plaintiffs' failure to pursue the class aspects of the case combined with evidence of record that union members had recently ratified the no-transfer rule, made it unlikely that plaintiffs could "fairly and inadequately protect the interests of the class." *Id.*, at 405, 97 S.Ct. at 1897, *quoting* Rule 23.

We do not have that situation before us. It is clear that Kyriazi, unlike the plaintiffs in *Rodriguez*, has suffered the same injury as that suffered by the class. Further, it is clear that she has adequately pursued in class claims at all stages of this litigation and, indeed, that she has proved them. The only question then is whether Kyriazi's claims are so dissimilar to those raised on behalf of the class that Western was prejudiced by having to defend them.

There clearly is some division of authority on the extent to which a plaintiff, who has been injured in one respect by an employer's discriminatory policies, may by way of a class action challenged employer's practices "across-the-board". However, numerous district courts have certified such "across-the-board" actions and, indeed, many Court of Appeals have held that it is an abuse of discretion for a district court not to do so. One such case is *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975). In that case, the named plaintiffs, who were or had been employed by the defendants as engineers, janitors and electricians, charged discrimination with respect to promotion.

One of the named plaintiffs was Hispanic, the rest were black, and all but one were male. They sought pre-trial to represent a class of "all females, Blacks and Hispano-Americans" who presently were or who might in the future be employed by the defendant. The district court refused to certify the class as requested, and instead certified four subclasses consisting of employees within the same job categories and minority groups as the named plaintiffs. The Tenth Circuit reversed, holding that the district court erred in refusing to permit the plaintiffs to bring an across-the-board challenge with respect to all of the defendant's discriminatory employment practices in all of its job categories:

> [T]he class was reduced to those individuals only who were of the same race or ethnic origin and who performed the same jobs . . .
>
> Class actions are generally appropriate in Title VII employment discrimination cases. The reason for this is that although these suits are self-help, so to speak, actions, they also have a broad public interest in that they seek to enforce fundamental constitutional principles . . .[citations omitted] . . .
>
> *The courts have made clear that in the design of these classes not every member of the class need be in an identical situation as the named plaintiff . . .*
>
> In the case at bar as in some of the other cases cited, the plaintiffs made a broad scale attack on the defendant's employment and

> promotion policies. Their complaint extended beyond challenging the promotional practices in their own departments and alleged the promotional policies throughout the plant had a discriminatory effect. *To the extent, therefore, that employees throughout the plant of Martin Company were discriminated against as a result of the company's policies, the plaintiffs made claims which embraced other people regardless of whether they were engaged in work identical to that of the plaintiffs.*

Id., at 340-1 (Emphasis supplied).

See also, Barnett v. W.T. Grant, 518 F.2d 543 (4th Cir. 1975) (district court erred in limiting plaintiff to proof that defendant discriminated against black applicants for position of "over-the-road driver" where plaintiff was prepared to prove discriminatory recruitment practices and failure to hire blacks into supervisory positions); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239 (3rd Cir.), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975) (former employee not entitled to reinstatement may represent class which includes present employees); *Long v. Sapp,* 502 F.2d 34 (5th Cir. 1974) (discharged minority employee may represent minority applicants as well as present and former employees of the defendant); *Johnson v. Georgia Highway Express,* 417 F.2d 1122, 1124-5 (5th Cir. 1969) (noting that "the Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class"). *See also,* Schlei and Grossman, *Employment Discrimination*

Law at 1095 (1976) noting that "[t]he common question of fact and law . . . is the existence of discrimination", and cases cited at *Id.*, 1089, note 25.[28]

Western relies on *Valentino v. U.S. Postal Service,* 16 F.E.P. Cases 242 (D.D.C. 11/18/77), in which a district court refused to permit a female professional employee to bring a class action on behalf of tens of thousands of women employed in over 4,000 separate jobs within the United States Post Office, "regardless of the location of the jobs." (p. 244). In denying class certification, the court noted that the nature and theory of plaintiff's claim were essentially different from that of the class—she sued on a theory of disparate treatment or intentional discrimination as to her—while she alleged a theory of disparate impact on behalf of the class. The court said:

> Plaintiff's individual complaint here is that she was not promoted because of her sex notwithstanding her qualifications. This essentially is a claim of disparate treatment. It is therefore different from a claim another woman might have that she encountered discrimination through the disparate impact of a general Postal Service employment practice that more harshly treats women than men. The different evidentiary burdens in the two kinds of claims negates a finding of typicality. *Id.* at 244. (footnotes omitted).

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28. To be sure, there is authority to the contrary. *See, e.g., Jacobs v. Martin Sweets Co.,* 550 F.2d 364 (6th Cir.), *cert. denied,* 431 U.S. 917, 97 S.Ct. 2180, 53 L.Ed.2d 227 (1977); *Cooper v. Allen,* 467 F.2d 836 (5th Cir. 1972).

While it is of course true that, as a professional employee—an engineer—Kyriazi did not have the identical experiences as the woman factory and clerical workers whom she represents, this does not mean that she fails to satisfy the typicality requirement of Rule 23, FRCivP. For it is clear to the Court that the discrimination suffered by Kyriazi was typical of the discrimination suffered by all women at Western. The Requisition for Personnel forms were used by supervisors who, like defendant Wertz, presided over men and women in broad range of job categories, from engineers to clericals. It is plain, then, that Kyriazi's claim of intentional discrimination is indeed typical of the class claim that Western intentionally discriminated against all of its female employees.

It should also be remembered that, in the largest sense, it is particularly apt for this plaintiff to represent, here, a class as broad as that she championed even while she was an employee at Western. It is evident that while at Western Kyriazi complained to her superiors concerning not only the treatment she was receiving, but the treatment which *all* women received at Western. That this annoyed her supervisors is clear. Indeed, during the October 1, 1971 tape-recorded interview between Kyriazi, Wilser and Wertz, Kyriazi was berated by Wertz, for her activities on behalf of "women's lib." (Exhibit D-225(a), page 17). Kyriazi saw herself as a victim of a plant-wide discriminatory policy; she continually protested against it and was fired, in part, because of it. It is not unfitting, therefore, that she be permitted to press that same claim here.

Nor is it clear just how Western has been prejudiced. Much of the same evidence, such as the personnel forms which were used for *all* job categories, the evidence of their alteration, the perjury of those who altered them, the discriminatory

advertising, and much more, would have to be proved over and over again if separate classes were formed for every different kind of job at Western. And how many classes would be appropriate? Western has not indicated the number it thinks appropriate. While none of these factors, of course, permits us to overlook the requirements of Rule 23, we should not strain to read that Rule to require women who have been deliberately discriminated against on a plant-wide basis to sue and sue and sue again in order to obtain a full measure of relief. If one were ill disposed to such suits it would, no doubt, be possible to say that Kyriazi can only represent a class of women engineers, with two advanced degrees, who were immigrants from Greece, for no one else is similarly situated or "typical". The Court, however, continues to feel that, on the facts of this case, it was correct in certifying the class as broadly as it did, and adheres to its pre-trial and mid-trial rulings for the reasons expressed then as well as now.

Accordingly, the Court finds that plaintiff has established that Western discriminated against plaintiff's class in hiring, in promotional opportunities, in participation in training programs in supervision, in layoffs and in discharge. The Court further finds that as a result of this discrimination within Western, women tended to be and were confined within certain types of jobs and levels of jobs.

As to the remaining claims on behalf of the class, the Court finds that plaintiff has failed to demonstrate, by a preponderance of the evidence, that females at Western were discriminated against with respect to maternity leave, college tuition refund benefits, or participation in the Bell System's Savings Plan. There is simply no credible evidence to support these latter claims. Indeed plaintiff's post-trial Proposed Findings of Fact and Conclusions of Law themselves largely

ignore these latter claims. To the extent that women are ineligible to participate in the Bell System's Savings Plan because only salaried employees are eligible and a majority of women employees are not "salaried" but "hourly" employees, this is a collateral consequence of the other discriminatory policies of Western, and will be adjusted by the Court in the remedy phase of the case.

XIV. KYRIAZI'S REMAINING CLAIMS

In addition to her Title VII claims against Western, Kyriazi claims that (1) Western and the five individual defendants conspired to deprive her of her federally-protected rights in violation of 42 U.S.C. §1985(3), and (2) that the five named individuals tortiously interfered with her employment at Western.

A. Kyriazi's §1985(3) Claims

A unanimous Court of Appeals for this Circuit, sitting *en banc*, has recently held that 42 U.S.C. §1985(3) is available to an individual who claims to have been discharged in retaliation for his advocacy of equal employment rights. *Novotny v. Great American Federal Savings & Loan Assoc. et al.*, 584 F.2d 1235 (3rd Cir. 1978) (*en banc*).

Specifically, the court held that (1) under the Supreme Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), discrimination against women constitutes "class-based animus"; (2) that Title VII is a law which guarantees "equal privileges and immunities" within the meaning of §1985(3); and (3) that a corporation can be deemed to have conspired with its own employees in violation of §1985(3). The court further noted that:

> [T]o deprive members of a class founded on gender of equal protection or equal privileges and immunities without any justification is to act in an irrational and odious manner . . .

Novotny, supra, at 1243.

The elements of a cause of action under §1985(3) were set forth by the Supreme Court in *Griffin*, where the Court stated that:

> To come within the legislation a complaint must allege that the defendants did (1) 'conspire . . .' (2) 'for the purpose of depriving . . . any person . . . of the equal privileges and immunities under the laws . . .' (3) did, or caused to be done 'any act in furtherance of the object of [the] conspiracy,' whereby another was (4) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'

Id., 403 U.S. at 102, 91 S.Ct. at 1798. It is clear that Kyriazi has established the existence of a conspiracy among Western and the five named individual defendants to deprive her of her federally-protected right to be secure from employment discrimination on the basis of sex. She has proved, and the Court so finds, that her co-workers Armstrong, Liu and Snyder jointly agreed to ridicule and harass her as a woman; that her supervisors Wilser and Boyd tacitly encouraged this conduct by deliberately choosing to overlook it; and that Western, through its agents, was a party to and carried out the object of the conspiracy, which was ultimately the termination of Kyriazi.

Appendix B — Opinion of the United States District Court for the District of New Jersey Dated October 30, 1978, as Amended November 22, 1978

B. Kyriazi's State Law Claim

Kyriazi has alleged and proved a pattern of conduct on the part of her co-workers and supervisors which amounts to a tortious interference with her employment contract with Western.

Where one intentionally acts to deprive another of an economic benefit, including an employment relationship, the law of New Jersey confers a right of action on the party aggrieved. Thus, in *Brennan v. United Hatters of North America, Local No. 17,* 73 N.J.L. 729, 65 A. 165 (Ct. of Errors and Ap's 1906), plaintiff alleged and proved at trial that the defendant union, of which he was a member, maliciously and without reasonable cause, served him with charges of an alleged violation, revoked his membership in the union, and, thus, prevented him from engaging in his trade. The court affirmed the verdict on behalf of the plaintiff, noting that "[t]he common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction from his fellow man . . ." 73 N.J.L. at 742, 65 A. at 170. More recently, in *Raymond v. Cregar,* 38 N.J. 472, 185 A.2d 856 (1962), New Jersey's highest state court found such a cause of action in favor of a physician who claimed to have been denied reappointment as a hospital physician because of the actions of his colleagues at the hospital. The court there isolated the elements of such a clause of action as consisting of (1) actual interference with an employment relationship which is (2) done with malice, that is, "the intentional doing of a wrongful act without justification or excuse." 38 N.J. at 480, 185 A.2d at 860. *See also, Harris v. Perl,* 41 N.J. 455, 197 A.2d 359 (1964); *Kuzma v. Millinery Workers Union, Local* 24, 27 N.J. Super. 579, 99 A.2d 833 (1953); *Strollo v. Jersey Central Power & Light,* 20 N.J.Misc. 217, 26 A.2d 559 (1942); Prosser, *Torts* §129 (4th Ed.)

Appendix B — Opinion of the United States District Court for the District of New Jersey Dated October 30, 1978, as Amended November 22, 1978

The Court is satisfied that Kyriazi's proofs at trial entitled her to recovery under the tort of malicious interference with her employment at Western. There is no need to find the facts a second time. The findings made in connection with her Title VII claim establish the deliberate tortious interference by Wilser, Boyd, Armstrong, Snyder and Liu with her employment relationship with Western.

Accordingly, compensatory and punitive damages will be awarded Kyriazi in an amount to be fixed by the Court at a later time. However, in holding that she is entitled to recovery on her 1985(3) claim and on her state law claim as well as on her Title VII claims, we do not mean to suggest that she is entitled to a double or triple recovery. Rather to the extent that compensatory damages have already been awarded under any of the claims, they are to be recovered only once. Punitive damages, on the other hand, are of course to be determined as a separate matter.

Judgment as to class liability shall be entered for plaintiff in accordance with the decision of this Court. Relief to be granted to the class, including injunctive relief, affirmative action, and a method to compute the amount of back pay which will be awarded to the class pursuant to 42 U.S.C. §2000e-5(g) shall be determined at a later stage. Defendants shall pay to counsel for plaintiffs all reasonable attorneys' fees, expenses and costs for these proceedings culminating in the judgments as to liability, 42 U.S.C. §20003-5(k). Counsel for plaintiff may submit an itemized accounting in relation to Phase I, governed by the principles laid down in *Lindy Bros. Bldrs. Inc. of Philadelphia v. American R. & S. San Corp.,* 487 F.2d 161 (3rd Cir. 1973); 540 F.2d 102 (3rd Cir. 1976). Upon the filing and serving of the appropriate affidavits the defendant shall have twenty (20) days thereafter to file any objections to any claim. Upon receipt of such objections, or if there be none, the Court will award such fees and expenses and costs as are just.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 30, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, et al.,

Defendants.

Civil Action No. 475-73

This matter having been tried without a jury commencing July 7, 1977 and concluding December 1, 1977, and the Court having made findings of fact in accordance with Rule 52(a) of the Federal Rules of Civil Procedure;

It is on this 30th day of October, 1978,

ORDERED that judgment be and is hereby entered on liability alone in favor of the class and against defendant Western Electric on the Title VII class claims; and it is further

ORDERED that judgment be and is hereby entered on liability alone in favor of plaintiff Kyriazi and against defendant Western Electric on Kyriazi's Title VII claims; and it is further

ORDERED that judgment be and is hereby entered on liability alone in favor of plaintiff Kyriazi and against defendant Western Electric and individual defendants Wilser, Boyd, Snyder, Armstrong and Liu on Kyriazi's claims under 42 U.S.C. §1985(3); and it is further

Appendix B — Judgment and Order of the United States District Court for the District of New Jersey Dated October 30, 1978

ORDERED that judgment be and is hereby entered on liability alone in favor of plaintiff Kyriazi and against defendants Boyd, Wilser, Snyder, Armstrong and Liu on Kyriazi's claim of tortious interference with her employment; and it is further

ORDERED that defendant Western Electric shall pay to counsel for plaintiff such reasonable attorney's fees, expenses and costs as are authorized under 42 U.S.C. §2000-5(k) within twenty (20) days of the filing by plaintiff's counsel of the appropriate affidavits; and it is further

ORDERED that the class claims with respect to discrimination in maternity leaves, college tuition refund benefits, and participation in the Bell System's Savings Plan be, and are hereby, dismissed.

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX C — OPINION AND ORDER OF REFERENCE AND GUIDELINES FOR SPECIAL MASTERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 21, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, et al.,

Defendants.

Civil Action No. 475-73

February 21, 1979

STERN, District Judge.

At the conclusion of "Stage I" of this Title VII litigation—the liability phase—this Court found that Western Electric discriminated against its female employees, applicants and former employees in the areas of hiring, promotion, participation in job training programs, layoffs, wages and opportunities for testing.[1] We now enter "Stage II", the damage phase. Stage II requires adjudication of the claims of thousands of class members.[2]

1. That opinion is reported at 461 F.Supp. 894 (D.N.J.1978). An earlier opinion of this Court on the discovery aspects of Stage I is reported at 74 F.R.D. 468 (D.C.1977).

2. Western reports that there are approximately 10,000 class members (Tr. 1/31/79 at 5), of which:

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Appendix C — Opinion and Order of Reference and Guidelines for Special Masters of the United States District Court for the District of New Jersey Dated February 21, 1979

To assist it in this formidable task, the Court has appointed three Special Masters pursuant to Rule 53(a) of the Federal Rules of Civil Procedure. The Court now addresses some of the procedural hurdles which confront it at this stage.

1. Burden of Proof

The Supreme Court has made clear that once there has been a finding of classwide discrimination, the burden then shifts to the employer to prove that a class member was not discriminated against; that is, a finding of discrimination creates a rebuttable presumption in favor of recovery. The Court first addressed this in *Franks v. Bowman,* 424 U.S. 747, 772, 96 S.Ct. 1251, 1268, 47 L.Ed.2d 444 (1976) in which it held that:

> [P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.

More recently, in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 361-2, 97 S.Ct. 1843, 1868, 52 L.Ed.2d 396 (1977), the Court specifically rejected the

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—1,131 are retired
—1,887 are active employees
—3,200 were laid off by Western
—3,500 were rejected by Western.

(Tr. 1/31/79 at 9-10).

contention that in the remedial stage of a pattern-or-practice case, the government must prove that the individual was actually the victim of discrimination:

> That basic contention was rejected in the *Franks* case. As was true of the particular facts in *Franks,* and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks,* the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

(Footnote omitted; citation omitted).

Accordingly, the sole burden upon class members will be to demonstrate that they are members of the class, that is, that now or at any time since June 9, 1971, they were either employed by Western, applied for employment at Western or were terminated by Western. In practical terms, this will be reflected in the Proof of Claim forms which class members will be required to fill out. Those forms require only that the putative class member state the dates of her employment and/or application, the positions she held and/or sought.[3] The Court will not require individual class members to specify the manner in which they were discriminated against. As was held in Stage I, employees remained for the most part ignorant of the fact that they were being passed over for promotion and training programs, and unsuccessful applicants may well be unaware that they were rejected on the basis of their sex. The fact is that employment decisions are rarely put in discriminatory terms, no matter how discriminatorily bottomed. Individual employees should not be put to the almost impossible task of delving into the corporate consciousness to demonstrate how an already proven policy of discrimination exactly impacted each one of them.[4] Thus, once an individual demonstrates that she is a class member, the burden will then shift to Western to demonstrate that the individual class member was not the victim of discrimination.

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3. Copies of the notice to the class and the Proof of Claim forms to be distributed to class members are reproduced in the Appendix to this opinion.

4. *Compare Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 259 (5th Cir. 1974), which held that each class member has the "initial burden . . . to bring himself within the class and to describe the harmful effect of the discrimination on his individual employment position." It is noteworthy, however, that *Pettway* was decided before the Supreme Court's decisions in *Franks* and *Teamsters.*

2. Notice

Pursuant to Rule 23(d)(2), Federal Rules of Civil Procedure, Western is required to give notice to class members in the following manner. All class members whose addresses are known to Western will be sent a notice and Proof of Claim form together with a prepaid envelope. The remaining class members will be notified by publication in six local newspapers for two consecutive weeks in the Sunday editions and three weekday editions.[5] All costs of notification are, of course, to be borne by Western. *See Love v. Pullman,* 13 FEP Cases 423 (D.Col.1976); *Sledge v. J.P. Stevens & Co.,* 18 FEP Cases 259 (E.D.N.C. 1976); *English v. Seaboard Coastline RR Co.,* 12 FEP Cases 90 (S.D.Ga.1975); and *Meadows v. Ford Motor Co.,* 62 F.R.D. 98 (W.D.Ky.1973).

The Court has scanned the early returns from the newspaper notices and the mailings and has determined that it would be advisable to supplement the notice to the nearly 1,900 class members who are presently employed by Western by providing an opportunity for class counsel to communicate with

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5. Those newspapers are *The* New York *Times, The* Daily *News, The* Newark *Star Ledger, The* Bergen *Record, The* New York *Post,* and *The* Jersey *Journal.*

A substantial number of class members, approximately 3,500 are women who applied for positions at Western and were rejected. Western reports that it does not have the addresses of these women, only their social security numbers. Counsel for the plaintiff has been directed to prepare a form of notice acceptable to the Social Security Administration to be forwarded to the last known business addresses of these women.

them directly at the plant.[6] Accordingly, Western will permit counsel for the class to enter the plant for the purpose of meeting with class members who are presently employed by Western. Western may accomplish this in any manner that will minimize loss of productivity and disruption of its normal activities, provided that the manner selected gives employees advance notice and a reasonable opportunity to meet with counsel. Undoubtedly, mass meetings will be required in order to minimize the number of visits which counsel will have to make. These meetings may take place before or after working hours, if Western prefers, but sufficient time must be allocated and a suitable facility must be provided. With these guidelines in mind, counsel are directed to meet and work out a schedule which will commence not later than March 12, 1979 and terminate not later than March 31, 1979, nine days before the April 9, 1979 cutoff date for the filing of claims by class members.

3. Computation of Back Pay Awards

The courts have adopted a number of approaches in connection with the computation of back pay awards.[7] One

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6. In this Circuit, counsel is permitted to confer with members of the class—indeed, a restriction upon counsel's ability to communicate with class members has been held violative of the First Amendment. *Coles v. Marsh,* 560 F.2d 186 (3rd Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977); *Rodgers v. United States Steel Corp.,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975). *See also, Developments in the Law—Class Actions,* 89 Harv.L.Rev. 1317, 1592-1604 (1976).

7. The back pay period commences two years before the filing of the EEOC charge. 42 U.S.C. §2000e-5(g). At Stage I, the Court concluded that the nature of the discrimination alleged and proved brought this case within the

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approach, the "pro rata" formula referred to in *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), and *United States v. United States Steel,* 520 F.2d 1043 (5th Cir. 1975), looks to the difference between the salary of the class members computed collectively and that received by employees of comparable skills and seniority, not the victims of discrimination. The class member then receives his pro rata share of that collective difference, based upon his salary differential and the number of competitors for the position. Another approach is the "test period" approach, used in *Bowe v. Colgate, Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973), in which the court awards class members the difference between the pay they receive after implementation of the Title VII decree and the pay they received while the discriminatory policies were in force. A variation of the "test period" approach was used in *Stewart v. General Motors,* 542 F.2d 445 (7th Cir. 1976), *cert. denied,* 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977), in which the court awarded the class members the difference between the wages of salaried white workers during a test period and that actually received by the class. Yet another approach was used in *Stamps v. Detroit Edison Co.,* 365 F.Supp. 87, 121 (E.D.Mich.1973), *rev'd on other grounds sub nom. EEOC v. Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975), in which the court awarded class members the difference between their own actual earnings and the earnings of the skilled trade opportunity jobs from the effective date of Title VII.

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"continuing violation" theory of Title VII, therefore, allowing class members to secure relief for acts of discrimination occurring since the effective date of Title VII. While it is clear that the back pay award is statutorily limited, the Court is considering what other forms of relief may be awarded for discrimination which occurred before the two year back pay period.

The Court finds none of these approaches appropriate here. As we found in connection with Stage I, we deal with discrimination which manifests itself in a number of ways. For example, a woman might initially be hired at the lowest grade—32—while a comparable male would have been hired at grade 33. During the course of a ten-year period, the woman—perhaps unbeknownst to her—would be passed over for promotion, denied entry into job training programs and, finally, notwithstanding her seniority, would be the first to be laid off because she was in the lowest job category. She may in fact have been laid off and rehired a number of times.[8] By contrast, the male, during the same period and having started at a higher grade, would be promoted several grades—perhaps even trained for a supervisory position—and would thus remain unscathed in times of layoffs. It is therefore, apparent that a back pay award must take into account the fact that a male and a female entering Western with comparable skills would, over a period of time, take dramatically divergent paths.

While this approach will not yield an exact measure of damages, neither could any other approach. However, the law is clear that where one has been damaged by the wrong of another, the victim is not to be denied any recompense merely because the exact measure of damages is uncertain. *See Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Hairston v. McClean Trucking Co.,* 520 F.2d 226 (4th Cir. 1975). The approach we adopt at least gives individual consideration to each claimant and, if not precise, it is no more imprecise than lumping claimants into groups and

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8. The preliminary responses already received from class members indicate that this is no rare experience for women at Western.

extracting averages, or otherwise depersonalizing victims of discrimination by running them through a mathematical blender.

Moreover, Western itself objects to any formula type or averaging approach in awarding back pay—that is, to any but an individual approach under which the merits of each woman's claim is separately considered. (Reply Brief at 7-11). In the face of Western's objections, it may be that due process considerations require that any award to an individual be on the merits of that individual's case. *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 267 (5th Cir. 1974) (Bell, J., concurring.) In any event, it does seem that an individual approach is more fair both to class members and to Western.

In its proposed Order of Reference, Western proposes that:

> 45. If there is more than one eligible claimant for a given designated vacancy, net back pay awards shall be computed for each claimant. One award shall be made in an amount equal to the highest individual net award. Each claimant shall share that award in the proportion that her individual net back pay award bears to her total of all claimants' net back pay awards pursuant to the formula set forth in *United States v. United States Steel*, 520 F.2d 1043 (5th Cir. 1975).

The Court rejects this approach. According to Western, if there were three women who should have been considered for one promotion and none were, and if we cannot now determine which of the three women should have received the promotion, then each one receives one-third of the benefits. As Western

notes, this approach does shield Western from having to pay three increases when only one was actually possible, but it also unjustly penalizes the one woman who was entitled to *all*—not just one-third—of the benefits of that promotion. Under Western's approach, two of the claimants get a windfall while the actual victim receives only one-third of the back pay to which she is statutorily entitled. If we know that all three claimants were discriminated against in that they were not considered for promotion but that only one—which, we do not know—would have actually received the promotion, then all three should get the full benefit of the promotional opportunity. Where it is proved that an employer unlawfully disregarded women for promotion, it is better that it pay a little more than to permit an innocent party to shoulder the burdens of the guilty. Western *will* be permitted to demonstrate that the promotion would have gone to one class member, rather than the others. However, if Western cannot demonstrate which claimant would have received the promotion, Western cannot divide the benefits of the one job. It is no more unreal to construe three promotions out of one, than to divide the salary increase of one promotion among three prospects. Either smacks of some artificiality but the latter protects the wrongdoer at the expense of the innocent.

The Order of Reference to the Special Masters is reproduced in the Appendix. Among other requirements, in an effort to assure back pay awards on as individualized basis as possible, where appropriate class members will be compared to the male employee with comparable skills upon initial hire and comparable seniority. The class member will then be awarded the difference between her salary and that received by the male counterpart, including bonuses and any other fringe benefits. *See Pettway v. American Cast Iron Pipe Co., supra.*

4. Compensation of Special Masters

The final problem which confronts us at the outset of Stage II is the compensation of the Special Masters.

All parties have recognized that the number of potential claimants virtually mandates the appointment of Special Masters. The parties agree that if any significant portion of the 10,000 potential claimants respond, the existing court mechanism of a district judge and a magistrate is totally inadequate to deal with the issues which will confront the Court. Even 3,000 claimants out of the 10,000 eligible, for example, would exceed the yearly civil filings for this entire district of nine active judges and five magistrates. Moreover, unlike a rough sampling of the typical civil case cross section, many of which will be voluntarily dismissed, others of which will be settled without any judicial supervision, and the overwhelming majority of which will be settled without any judicial factfinding,[9] it appears that each one of the claims of Western's present or former employees will have to be individually considered and adjudicated. Western has objected to any formula approach, and has requested that each claim be considered upon its own merits. The Court agrees that not only is Western entitled to this approach, but that each claimant is also entitled to individual consideration. In many instances this approach requires that efforts be made to project the actual benefits lost by each Western employee who has been found to have been a victim of Western's discrimination. Whole work histories will have to be recast, based on evaluations of the background, education,

9. In 1978, approximately 90% of the civil actions filed in this District were terminated some time prior to trial. *Management Statistics for United States Courts* (1978).

potential and abilities of each claimant, as compared with the opportunities available to and realized by similarly situated males at Western. In a very real sense, Stage II proceedings under this approach resemble a host of individual cases, sharing many common questions of law and fact, as much as it does the pure class action of more common experience.

Faced with this task, the parties agree not merely to the appointment of a Special Master, but to the appointment of three Special Masters. The parties also agree that these Special Masters should not only be lawyers, but experienced trial lawyers. Western has demanded, and the Court has granted, an opportunity for it to conduct "discovery regarding the . . . claims pursuant to the Federal Rules of Civil Procedure." If the past is any gauge of the future, the Special Masters will be occupied with discovery matters concerning many hundreds of claimants even before they get down to dealing with the merits of each.

Western suggests, citing *Newton v. Consolidated Gas,* 259 U.S. 101, 42 S.Ct. 438, 66 L.Ed. 844 (1921), that the Special Masters' compensation should be keyed to the salary of a district judge, if not a magistrate. Thus, Western suggests that the Special Masters be compensated at a rate between $30 and $40 an hour.

Because of the complexity of the task they assume—which will include not only the computation of back pay, but also discovery disputes and fact-finding—the Court finds that it is in the best interests of the class members to appoint attorneys well known for their integrity, service to the community, and litigation skills and experience. In order to justify this imposition upon their time, the Court finds that it must compensate them in

a manner comparable to what they receive in their private practices, and not to limit them to the salary of a judge, who has no overhead costs, no staff to pay, whose retirement is paid, and so forth. And, while in the more typical case an attorney who served as Special Master should expect to receive at least some of his compensation in the honor of his selection and service, this is not the typical case. The Special Masters here will have to devote a substantial amount of time for an unforeseeable future in order to provide the individual consideration wanted and required.

The question of the compensation of Special Masters received extended discussion in *Newton v. Consolidated Gas Co., supra*. In that case, the Supreme Court reversed as excessive the district court's award of fees to a special master, noting that, while normally such matters were within the discretion of the district court, the award of excessive fees would be deemed an abuse of discretion. The Court went on to hold that the proper compensation should be keyed to public salaries with a premium to attract persons of high caliber from the private sector:

> His compensation should be liberal, but not exorbitant. The rights of those who must ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and *temporary* employment which often seriously interferes with other undertakings.

Id., at 105, 42 S.Ct. at 439. (Emphasis added)

Since the *Newton* decision, the question of the compensation of special masters has received little discussion: some courts have approved the award of fees which appear to be roughly comparable to that which is earned in private practice; *see, e.g., American Safety Table v. Schreiber,* 415 F.2d 373 (2nd Cir. 1969) (approving rate of $40 per hour—in 1969); *Chesa International v. Fashion Associates,* 425 F.Supp. 234 (S.D.N.Y.1977) (fee of $100 an hour), while others have awarded a somewhat lower rate, *see, e.g., Hart v. Community School Board of Brooklyn,* 383 F.Supp. 699 (E.D.N.Y.1974), *appeal dismissed,* 497 F.2d 1027 (2nd Cir. 1974) (fee of law school professor in school desegregation case to be about half that charged by attorneys in private practice, but all overhead costs paid).

The Court finds that it is in the interest of all the parties—particularly the class members—to compensate the Special Masters in a manner roughly comparable to that which they receive in the practices from which they are being diverted. The Court cannot be blind to the fact that the path ahead of the Special Masters is a thorny one—one that will include complex questions of damage, difficult and tedious discovery disputes, hearings and fact finding. Further, the Special Masters will necessarily be diverted from their own practices, losing not only present business but also the future business which a successful attorney-client relationship ensures. While it is true that the Supreme Court—in 1922—suggested that special masters in "temporary" employment, are to be compensated only slightly in excess of the salaries received by public officials, the Court finds this goal no longer viable given the realities of the current practice of law, and that which faces the Special Masters here is

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no temporary endeavor. Months, if not years of arduous work lie ahead, and Western's suggested compensation for the trial lawyers it wishes as Special Masters is less than what many firms in this area bill for paralegal clerical employees.

Accordingly, the Court will compensate the Special Masters as follows: an hourly rate of $125 will be awarded Bernard Hellring, Esquire, who has been designated the "Administrative" Special Master; and an hourly rate of $115 will be awarded the two other Special Masters, Thomas F. Campion, Esquire and Bruce I. Goldstein, Esquire. This is less than what they would usually bill for such a service—as Western does not dispute—but these three members of the Bar have indicated their willingness to take less, notwithstanding the protracted nature of the proceedings as a part of their obligations as members of our Bar.

The fees will be paid at designated intervals and will be borne by the defendant. *See Stastny v. Southern Bell Tel. & Tel. Co.*, 458 F.Supp. 314 (W.D.N.C.1978).

Appendix "A"

TO: Female Applicants, Employees or Former Employees of Western Electric's Kearny Plant (including the Clark Shops)

RE: Sex Discrimination Action Against Western

If you are a woman and now or any time since June 9, 1971 you either: (a) applied for employment at Western's Kearny plant and were rejected; *or* (b) were employed in any position at Western's Kearny plant; *or* (c) were laid off or discharged from any position at Western's Kearny plant, please read this notice carefully.

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On October 30, 1978, in a lawsuit brought by Kyriaki Cleo Kyriazi, a former employee of Western, the United States District Court for the District of New Jersey found that Western has been discriminating against its women employees at its Kearny plant in violation of federal law. It was found that women, *as a group,* were discriminated against in the following ways:

1) *Hiring*—Women are hired into the lowest grades, while men with equal skills and experience were hired into the higher grades.

2) *Promotion*—Women employees were not given promotional opportunities equal to male employees.

3) *Layoffs*—Women were not treated fairly when employees had to be laid off.

4) *Transfer into Kearny*—Women who transferred into the Kearny plant were placed in lower grades than they were in before they transferred.

5) *Discharge*—More women were fired than men.

6) *Participation in Job Training Programs*—Women were not given the opportunities given to men to participate in job training programs.

7) *Opportunities for Testing*—Women were not given the opportunity to take tests for promotion to better positions.

The Court has completed the first stage of this lawsuit by finding that Western had discriminated against women in its Kearny plant. Copies of the Court's opinion are on file in the United States District Court of the District of New Jersey.

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There will be soon be a second stage, "Stage II", at which time the Court will determine the damages and other relief which it will award to individual women. If you are or were at any time since June 9, 1971 an employee of Western, or if you ever applied for a position at Western, you may be entitled to certain benefits, including monetary payments. The "Stage II" proceedings will determine this question. At these "Stage II" proceedings, any eligible woman will be presumed to have been discriminated against. It will be Western's duty to show that it did not deny a woman employment opportunities because of her sex. If Western fails to demonstrate this, that women will be entitled to recovery, which may include back pay and reinstatement.

If you wish to be considered, you must fill out the enclosed form. Your claim will not be considered if you do not do so and return the form by April 2nd, 1979. If you do fill out the form, you may be required, with no cost to yourself, to participate in court proceedings. You will be furnished an attorney without cost to you. That attorney will be Judith Vladeck, Attorney for plaintiff Kyriazi. If you prefer, you may retain an attorney of your own choosing. If you wish further information, you may contact the attorney for the plaintiff, Judith Vladeck, at (212) 354-8330

AS PART OF THE COURT'S ORDER, YOUR EMPLOYER MAY NOT PENALIZE YOU IN ANY WAY IF YOU CHOOSE TO FILE A CLAIM AGAINST IT.

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APPENDIX "B"

Kyriazi v. Western Electric 475-73

_____

NAME

_____

ADDRESS

_____

TELEPHONE NUMBER

Answer each question to the best of your ability.

1) Did you use any other name while employed at Western's Kearny Plant? (Indicate yes or no) _____ If so, please set forth the names you used and the dates you used each name.

NAME	DATES
_____	_____ – _____
_____	_____ – _____

2) What is your social security number? _____

3) Were you rejected for a position at Western's Kearny Plant? (Indicate yes or no) _____ If so, please set forth the date of your application and the position for which you applied._____

4) Are you presently employed at Western's Kearny Plant?_____ If so, when did your employment begin?_____

Please list all positions you have held at Western, (the grade, if the position was graded), and the dates you held each position.

POSITION	GRADE	DATES
_____	_____	_____ – _____
_____	_____	_____ – _____
_____	_____	_____ – _____

5) Were you laid off or otherwise terminated by Western?_____ If so, when did your employment end? _____

What was the reason given for your termination?_____

_____

Set forth each of the positions you held at Western's Kearny plant and the dates you held each position.

_____	_____ – _____
_____	_____ – _____
_____	_____ – _____

6) Have you been employed since you left Western?_____ If so, please set forth the positions you have held since you left Western and the dates you held each position.

_____	_____ – _____
_____	_____ – _____
_____	_____ – _____

Please send the completed form to:
Angelo Locascio, Clerk
United States District Court
U.S. Post Office and Courthouse
Newark, New Jersey 07101

ORDER OF REFERENCE AND GUIDELINES FOR SPECIAL MASTERS

Appendix "C"

Pursuant to Rule 53(b) of the Federal Rules of Civil Procedure,

It is on this 21 day of February, 1979,

ORDERED that these cases are hereby referred to Thomas F. Campion, Esquire; Bruce I. Goldstein, Esquire; and Bernard Hellring, Esquire, as Special Masters to conduct proceedings and determine which of the members of the class are eligible to receive back pay, to calculate the amount of back pay to be awarded, and to take any and all such other actions as are specified and directed as set forth herein.

The Special Masters are specifically granted all necessary authority and empowered to achieve the aims embraced within the intent and purpose of this Order of Reference including but not limited to the right to hear all discovery motions, hold hearings, and administer any and all such other actions as may be necessary to carry out their duties in meeting their obligations to this Court.

Upon the conclusion of said proceedings, the Special Masters shall, pursuant to Rule 53(e), submit to this Court for consideration a Report setting forth findings of fact, conclusions of law and recommendations for relief.

GUIDELINES

1. The class of women eligible to file their claims and have them adjudicated are:

> all females who are now or at any time since June 9, 1971, have been employed by defendant Western Electric Company, or sought employment with said Company during the pendency of this suit, at the Kearny Works Organization.

2. This Court has ordered that class members be notified of their eligibility to present claims and participate in hearings before the Special Masters pursuant to this Order of Reference by a "Notice to Class" approved by this Court. The Notice requires all class members who seek to pursue their claims to fill out a "Proof of Claim" form, approved by this Court, certifying in writing that they are members of the class and that they will pursue their claims. It also requires the class members to answer questions concerning each claim. These Proof of Claim forms must be filed with the Clerk of the Court not later than April 9, 1979.

3. The Special Masters are directed to exclude from consideration those females who do not file Proof of Claim forms within the time provided, unless applicant shows good cause which shall not include neglect.

4. The Special Masters shall file and serve on the parties a complete list of those class members whose claims are included and those who are excluded and the reason for each individual exclusion.

5. Western shall be permitted to engage in discovery regarding the remaining claims pursuant to the Federal Rules of Civil Procedure. The Special Masters shall rule on all discovery motions made with regard to the claims assigned to them.

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6. The claims shall be assigned among the Special Masters by Bernard Hellring, Esquire, who shall serve as Administrative Special Master.

7. Thereafter, the Special Masters shall conduct hearings upon the claims and make findings of fact, conclusions of law, and recommendations for relief in accordance with the guidelines set forth below. All findings shall be subject to review by this Court.

8. The Special Masters shall develop a schedule for the hearing of claims as well as for discovery with respect to the various claims. The schedule shall provide for the completion of discovery with respect to any particular claim sufficiently in advance of hearing on that claim, and for discovery with respect to claims to be heard in the future to proceed concurrently with the hearings on other claims.

9. Each claimant must make out a *prima facie* case. To make out a *prima facie* case, an individual must establish that she is a member of the class during the period in controversy. The Special Masters shall modify the following guidelines with respect to burdens of proof where appropriate upon motion by either party.

HIRING CLAIMS

10. In order to make out a *prima facie* case with regard to hiring, a claimant must prove:

1. On or after June 9, 1971 she applied for employment with Western; and

2. a) was not hired; or

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b) was hired into a lower graded job than some other position for which she was qualified.

11. If the claimant establishes her claim, the burden shifts to Western to rebut the claims:

a. That the individual was not hired by demonstrating:

1. There were no vacancies; or

2. The claimant was not qualified for any vacant positions; or

3. A woman was hired to fill the vacancy; or

4. A man better qualified to perform the work was hired; or

5. The claimant refused offers of employment; or

6. The claimant was not hired for reasons other than sex discrimination; or

b. That the individual was hired into a lower graded job than she was qualified for by demonstrating;

1. There were no vacancies in such position; or

2. The claimant was not qualified for such position; or

3. A woman was hired to fill the vacancy; or

4. A man better qualified to do the work was hired; or

5. The claimant refused higher graded positions; or

6. The claimant was not hired into a higher graded position for reasons other than sex discrimination.

12. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for failing to hire her or hiring her into a lower graded job than the position she was qualified for is, in fact, a pretext for sex discrimination.

13. If Western fails to meet its burden,

a. the individual who establishes that she should have been hired shall be awarded retroactive seniority to the date she should have been hired, and placement on the Priority Hire List as set forth in paragraphs 40-41.

b. the individual who establishes that she should have been hired into a higher graded job shall be awarded back pay computed as directed in paragraphs 42-47.

PROMOTION CLAIMS

14. In order to make out a *prima facie* case with regard to promotion, a claimant must prove:

1. On or after June 9, 1971 there were promotional opportunities available and that she was not promoted.

15. If the claimant establishes her promotion claim, the burden shifts to Western to rebut the claim by demonstrating;

1. there were no promotional opportunities available; or

2. the claimant was not qualified for promotion; or

3. a woman filled the vacancy; or

4. a man better qualified to perform the work filled the vacancy; or

5. the claimant refused opportunity for promotion; or

6. the claimant was not promoted for reasons other than sex discrimination.

16. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for failing to promote her is, in fact, a pretext for sex discrimination.

17. If Western fails to meet its burden, the claimant shall be awarded back pay computed as directed in paragraphs 42-47.

TRANSFER CLAIMS

18. In order to make out a *prima facie* case with regard to transfers, the claimant must prove;

1. on or after June 9, 1971 she transferred into the Kearny Works Organization; and

2. she was transferred into a lower graded job than she held immediately prior to transfer, or a lower graded job than she was qualified for at the Kearny Works Organization.

19. If the claimant establishes her claim, the burden shifts to Western to rebut the claim that the individual was transferred

into a lower graded position than she held immediately prior to transfer or than she was qualified to hold by demonstrating:

1. no jobs were available in her prior grade;

2. there were no jobs for which the claimant was qualified in her prior grade;

3. the claimant turned down offers of a position in her prior grade;

4. the claimant was denied a position in her prior grade for reasons other than sex discrimination; or

5. the claimant was not given a higher graded job for reasons other than sex discrimination.

20. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for transferring her into a lower graded job than she held immediately prior to her transfer is, in fact, a pretext for sex discrimination.

21. If Western fails to meet its burden the claimant shall be awarded back pay computed as directed in paragraphs 42-47.

LAYOFF CLAIMS

22. In order to make out a *prima facie* case with regard to layoff, a claimant must prove:

1. she was laid off from a position at Western.

23. If the claimant establishes her claim, the burden shifts to Western to rebut the claim by demonstrating that the claimant would have been laid off in any event for nondiscriminatory reasons.

24. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for laying her off is, in fact, a pretext for sex discrimination.

25. If Western fails to meet its burden, the claimant shall be awarded (1) back pay computed as directed in paragraphs 42-47, taking into account as a set-off any severance pay or lay-off allowance paid to claimant as a result of her lay-off, and (2) if claimant is currently laid off, placement on the Priority Hire List as set forth in paragraphs 40-42.

DISCHARGE CLAIMS

26. In order to make out a *prima facie* case with regard to discharge, a claimant must prove:

1. on or after June 9, 1971 she was discharged.

27. If the claimant establishes her claim, the burden shifts to Western to rebut that claim with evidence that the claimant was discharged for reasons other than her sex including, but not limited to, poor performance, excessive absenteeism or tardiness, misconduct, insubordination, violation of company rules, etc.

28. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for discharging her is, in fact, a pretext for sex discrimination.

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29. If Western fails to meet its burden, the claimant shall be awarded retroactive seniority to the date she was terminated, as set forth in paragraphs 40-41, and back pay as computed as directed in paragraphs 42-47.

TRAINING CLAIMS

30. In order to make out a *prima facie* claim with regard to training programs, the claimant must prove:

1. on or after June 9, 1971 she was not given an opportunity to enroll in the Shop Staff Trainee Program, the Management Training Program or particular training courses at the Corporate Education Center in Princeton.

31. If the claimant establishes her claim, the burden shifts to Western to rebut her claim by demonstrating:

1. she was not qualified for the training programs or courses; or

2. there were no vacancies in the training programs or courses; or

3. the training programs or courses were not being given at the time she sought to enroll in them; or

4. the vacancy in the training programs or courses was filled by a woman or better qualified man; or

5. she refused opportunities to enroll in such training programs or courses, or that she would have refused; or

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6. she was denied enrollment in such training programs or courses for reasons other than sex discrimination.

32. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for denying her admission into the particular training program or course is, in fact, a pretext for sex discrimination.

33. If Western fails to meet its burden, the claimant shall be entitled to an order directing Western to offer her the opportunity to enroll in the particular training program or course, which had previously been discriminatorily denied.

TESTING OPPORTUNITIES

34. In order to make out a *prima facie* case with regard to testing a claimant must prove:

1. on or about June 9, 1971 she was not given the opportunity to take a particular test.

35. If the claimant establishes her claim, the burden shifts to Western to rebut the claim by demonstrating:

1. she was not qualified to take the test; or

2. the tests were not being given at any particular time she would have been eligible; or

3. she refused the opportunity to take the test, or would have so refused; or

4. she was denied the opportunity to take the tests for reasons other than sex discrimination.

36. If Western meets its burden by a preponderance of the evidence, relief shall be denied unless the claimant can prove that Western's reason for denying her the opportunity to take the test is, in fact, a pretext for sex discrimination.

37. If Western fails to meet its burden, the Special Master shall make a finding that the claimant should have been given the test and recommend that the claimant be given the test. The Special Master shall retain jurisdiction over her claim until the test is administered to the claimant and scored.

RETROACTIVE SENIORITY

38. Once a determination that a claimant shall be entitled to individual relief has been made, a date representing the earliest date on which the claimant should have been hired into or promoted to the particular job in question, the date on which the claimant was transferred into the Kearny Works Organization, or the date on which the claimant was laid off or discharged shall be assigned. The date shall be termed the "designated date" for the claimant. An individual claimant may have more than one designated date in recognition of the fact it may have been established that she had a valid claim for more than one job, or would have had a claim for a series of subsequent promotional opportunities had she received the earlier promotion which she had been discriminatorily denied.

39. The claimant shall be given retroactive seniority, where appropriate, to her designated date.

PRIORITY HIRE LIST

40. As to those applicants for entry level hire who were never employed by Western because of an initial discrimination against them, a Priority Hire List shall be established which lists all class members entitled to the first entry level vacancies available for each job. Class members shall be placed on the Priority Hire List for each job according to their respective designated dates. A similar Priority Hire List shall be established for all above entry level applicants who were discriminatorily turned away by Western and never hired. Such lists shall be maintained according to job category and class members shall be placed on each such List according to their designated dates.

41. Western shall undertake to make offers of employment to such claimants on the Priority Hire Lists as follows:

a. Selection for hire from the Priority Hire List shall be in chronological order of the designated dates for each job, beginning with the earliest designated date.

b. If there are multiple eligible claimants for hire into an entry level grade or for hire with a common designated date, such claimants shall be offered the available position in the order of their respective seniority with Western, if applicable, or with respect to date of application for hire, earliest first. As a last resort, alphabetical order shall be used. The offer to the most senior claimant among more than one claimant for a particular vacancy shall eliminate any obligation to make an additional offer to the other claimants for that vacancy.

BACK PAY

42. As to members of the class who were discriminatorily laid off by Western, each such claimant shall be entitled to back pay from that date of the discriminatory lay off, "designated date", until the cutoff date, or until the date when that employee would have been laid off, absent the discriminatory practices of Western, whichever date is earlier. It shall be Western's burden to show that a date earlier than the cutoff date should be utilized.

43. As to members of the class who have been retired or who are still employed by Western, or who have been laid off by Western, the Special Masters shall, where appropriate, compute the amount of back pay to be awarded to a claimant as set forth below.

The term "back pay period" for each eligible claimant shall mean the period ending on the cutoff date and commencing on either January 9, 1970, or her "designated date", whichever date is later.

As noted in paragraph 38, a claimant may have more than one designated date, with respect to, for example, a second or third promotion, consideration for which was discriminatorily withheld because of a failure, based on discrimination, to award an earlier promotion. So, too, there may be claimants who have been discriminatorily laid off more than once and several times improperly denied promotional opportunities. The Special Master is to employ the following criteria:

a. As to class members who applied for employment at Western but were never hired, back pay shall be awarded from the date on which the position was open until such

time as the applicant obtained another position or should have obtained other employment in the exercise of due diligence or the position ceased to exist, whichever is earliest. It shall be Western's burden to prove that a class member could have obtained other employment in the exercise of due diligence or that the position ceased to exist on a given date.

b. Employees who were discriminatorily laid off or fired, but who were not discriminated against as to promotion, shall be entitled to back pay as described in paragraph 42.

c. As to any employee who was discriminatorily treated as to promotion, such a claimant, in addition to back pay as authorized by paragraph 42, *for that period while laid off,* shall be entitled to receive the back pay of the position which was discriminatorily denied. Such back pay means annual earnings, including straight time, required overtime, shift differentials and fringe benefits such as vacation.

44. If the Special Master can determine that, as to a particular promotion, that promotion would have gone to a particular claimant but for Western's discrimination, and that the particular claimant would, absent Western's discriminatory practices, have remained in that position for the rest of her career at Western, or until the cutoff date, back pay shall be computed accordingly.

However, if there is more than one eligible claimant for a given designated vacancy, and if the Special Master cannot ascertain which among several claimants but for Western's

discriminatory practices would have or should have obtained the position, then every such eligible claimant shall be treated for back pay purposes as being entitled to that promotion. Similarly, with respect to applicants, where more than one woman applied for a position and if the Special Masters cannot ascertain who would have obtained the position—each woman shall be treated for back pay purposes as being entitled to the vacancy.

45. To the extent practicable, after the Special Master determines the effective date of such a promotion, the Special Master shall consider whether or not the claimant would then have been eligible for consideration for promotion to the next higher grade or grades. If so, and if the claimant has been found to have been discriminatorily denied a subsequent promotion by reason of ineligibility due to an earlier discriminatory denial, then the Special Master shall assign the claimant an additional "designated date" or dates. The Special Master shall, to the extent practicable, analyze the work record of each claimant, her qualifications, the objective and subjective indicia of interest in promotion, as well as the promotional opportunities which actually would have been available to her absent discrimination in an attempt to reconstruct as fairly and accurately as possible what her progress would have been at Western if she had been given the same opportunities as the most nearly identical male was given. The Special Master should, in this regard, take into account the promotional vacancies available at each level of his inquiry and consider the caliber of the male and female competition which the claimant faced, or would have faced. The Special Master, should, if possible, designate a model drawn from a male employee who most nearly resembles the female claimant in terms of employment date, background and education and may use that model, to the extent it is helpful, in

attempting to project the course which a claimant's career would have been expected to take had she been given the same promotional opportunities. In making an award of a "designated date" based on a discriminatorily denied promotion, whether the initial promotion beyond the claimant's actual grade, or a projection of subsequent promotions, the Special Master shall specifically indicate the promotional opportunity, which employee actually received that promotion, which employees should have been considered for it and, in making the award to a claimant, the basis of the selection, or, if more than one claimant is awarded the "designated date" indicated by that promotional opportunity, why it is not possible to pick only one claimant.

46(a). The term "back pay period" for each eligible claimant shall mean the period ending on the cutoff date and commencing on either January 9, 1970, or her designated date, whichever date is later.

(b). The "cutoff date" for back pay shall be the date of entry of final judgment in this case or the date on which the class member has been restored to her rightful position at Western, whichever is earlier.

(c). From the designated date for each eligible claimant for each job involved, the annual earnings of the person who actually filled the designated vacancy for which the claimant has been determined eligible and qualified shall be calculated for the appropriate period. The annual earnings shall include straight time, required overtime, shift differentials, and fringe benefits such as vacation. If the employee who filled the designated vacancy did not occupy the position at the cutoff date, the comparative earnings shall be computed as if the employee

remained in the position until the cutoff date. If there are unusual circumstances (such as extended illness) which tend to reduce the gross back pay figure, then a reasonable amount shall be determined.

(d). The claimant's income during the backpay period shall be determined. The claimant's income shall include salary actually earned or the amount she would have earned with reasonable diligence. This figure shall be subtracted from the gross back pay award.

(e). Western should be required to withhold from any back pay award appropriate amounts for federal, state and local taxes.

(f). In addition, the claimant shall be entitled to "front pay" for as long as the position continues or until she obtains the position from which she was discriminatorily excluded.

47. If back pay is awarded a claimant because she has established a right to a particular position, back pay will be cut off on the date Western can show that claimant would not have retained that position for reasons other than sex discrimination, *e.g.*, work force reductions, layoff.

JURISDICTION

48. The Special Masters shall retain jurisdiction over any claims for the purpose of administering the relief determined to satisfy such claim.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 2, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 475-73

KYRIAKI CLEO KYRIAZI,

Plaintiff,

v.

WESTERN ELECTRIC CO.,

Defendant.

It is on this 2nd day of March, 1979,

ORDERED that the Special Masters shall be compensated as follows: Bernard Hellring, Esquire, the Administrative Special Master, at the rate of $125 an hour; Thomas F. Campion, Esquire, and Bruce I. Goldstein, Esquire, at the rate of $115; and it is further

ORDERED that Western Electric Co. bear the costs of compensating the Special Masters and that the Special Masters be paid quarterly; and it is further

ORDERED that Western Electric Co.'s liability for the compensation of the Special Masters shall accrue as of November 9, 1978.

s/ Herbert J. Stern

HERBERT J. STERN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 6, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

vs.

WESTERN ELECTRIC CO., el al.,

Defendants.

Civil Action No. 475-73

It is on this 6 day of March, 1979,

ORDERED that the Order of Reference and Guidelines for Special Masters, signed February 21, 197 in the above-captioned matter, be and it hereby is, amended as follows:

Paragraph 41c., page 10: delete the entire paragraph.

Paragraph 43a., page 11: delete the present ¶43a. and substitute the following so that ¶43a. reads:

> As to class members who applied for employment at Western but were never hired, back pay shall be awarded from the date on which the position was open until such time as the applicant obtained another position or should have obtained other employment in the exercise of due diligence or the position ceased to exist,

> whichever is earliest. It shall be Western's burden to prove that a class member could have obtained other employment in the exercise of due diligence or that the position ceased to exist on a given date.

Paragraph 44, page 12: after the paragraph ending "...entitled to that promotion.", add the following paragraph:

> Similarly, with respect to applicants, where more than one woman applied for a position and if the Special Masters cannot ascertain who would have obtained the position, each woman shall be treated for back pay purposes as being entitled to the vacancy.

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 14, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

vs.

WESTERN ELECTRIC COMPANY, et al.,

Defendants.

Civil Action No. 475-73

An order having been entered in this matter on July 18, 1975, determining that the above-entitled action be maintained as a class action, and plaintiff having thereafter moved for an order modifying and amending the said order so as to provide for determination of class liability prior to a determination of liability to individual class members, and granting such other and further relief as to the Court might seem just and proper, and after consideration of the contentions of the parties as to further conduct of this action, and good cause having been shown, it is

ORDERED:

That the issues raised by the complaint herein shall be tried in two separate and independent stages, to wit, the issues of liability of the defendant Western Electric to the class and of class relief, and of the liability of all defendants to the named plaintiff, Kyriaki Cleo Kyriazi, and the relief to which she may

be entitled, shall be severed from the determination of the amount of back pay or other specific relief for individual members of the class; and it is further

ORDERED, that notification of the pendency of this action and of their rights thereunder may be made to individual members of the class from time to time by plaintiff's counsel, in a form and manner approved by the Court upon notice to the defendant Western Electric of the proposed form of notice, and it is further

ORDERED, that discovery having been conducted and completed on the class action issue, the following schedule of discovery on the merits shall be maintained, except upon good cause shown:

(1) Plaintiff shall serve upon defendant Western Electric Company all interrogatories, demands for production of documents, and demands for deposit of documents in appropriate depositories, relating to the issue of liability to the class and of class relief on or before October 13, 1975; and

(2) Any additional discovery required for the purposes of calculating or determining back pay to the class or to the individual members of the class or of other specific relief to the individual members of the class, shall to the extent practicable, proceed simultaneously with the discovery relating to the issue of liability to the class; to the extent such simultaneous discovery is not practicable, further discovery shall be conducted in accordance with a further direction of the Court upon application of the parties; and it is further;

ORDERED, that plaintiff shall, not later than November 17, 1975, serve upon defendants and file with the Court a pre-

Appendix D — Order of the United States District Court for the District of New Jersey Dated October 14, 1975

trial memorandum setting forth each claim being asserted on behalf of plaintiff Kyriazi, and each claim being asserted on behalf of the class, and stating precisely what is alleged to have been discriminatorily denied to plaintiff Kyriazi, and to the class, and setting forth and delineating proofs by which plaintiff intends to substantiate the contentions raised on behalf of plaintiff Kyriazi, and the class, which said pretrial memorandum shall include or describe copies of each and every document upon which plaintiff intends to rely in proving such claims of the plaintiff Kyriazi, and the class at trial, and it is further.

ORDERED, that 60 days after service and filing of plaintiff's pre-trial memorandum, defendant Western Electric shall serve upon plaintiff and file with the Court a pre-trial memorandum setting forth defendant's factual contentions with respect to each of the allegations made by plaintiff, which said pre-trial memorandum shall also set forth the proof that defendant intends to present, and shall include or describe therein copies of all exhibits upon which it intends to rely at trial.

Dated: October 14, 1975

s/ Herbert J. Stern
U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 27, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

v.

WESTERN ELECTRIC CO.,

Defendant.

Civil Action No. 475-73

It is on this 27 day of February, 1979,

ORDERED that Western Electric Co. shall pay temporary interview attorney's fees and disbursements to counsel for the plaintiff in the amount of $280,834.49, less $20,000 to be used towards obtaining a surety bond, within seven (7) days hereof; and it is further

ORDERED that Western Electric Co. shall pay to counsel for the plaintiff, on a quarterly basis, attorney's fees and disbursements incurred during Stage II of this action, less the sums incurred by Western Electric Co. in obtaining a surety bond; and it is further

Appendix D — Order of the United States District Court for the District of New Jersey Dated February 27, 1979

ORDERED that in the event that plaintiff ultimately prevails, counsel for the plaintiff shall be entitled to recover the amount withheld by Western Electric Co. to cover the costs of obtaining surety bonds.

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 9, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

vs.

WESTERN ELECTRIC COMPANY,

Defendants.

Civil Action No. 475-73

This matter having been heard by the Court on Tuesday, March 6, 1979 in the presence of attorneys for plaintiff Vladeck, Elias, Vladeck, & Engelhard (Judith P. Vladeck, Esq., appearing) and attorneys for defendant, Pitney, Hardin & Kipp (Edward P. Lynch, Esq., and Claire B. Dubin, Esq., appearing), pursuant to the Court's letter of February 26, 1979 scheduling a hearing to dispose of motions pending before the Court;

IT IS on this 9 day of March, 1979

Ordered that:

(1) the first paragraph of the Court's Order of February 27, 1979 which provides:

> "that Western Electric Co. shall pay temporary interview [sic; interim] attorney's fees and disbursements to counsel for the plaintiff in the

Appendix D — Order of the United States District Court for the District of New Jersey Dated March 9, 1979

amount of $280,834.49, less $20,000 to be used towards obtaining a surety bond within seven (7) days hereof;"

shall not be stayed;

(2) the Court's further direction on March 6, 1979 that Western Electric Co. pay the remaining $20,000 on Monday, March 12, 1979 shall not be stayed; and

(3) the second paragraph of the Court's Order of February 27, 1979 which provides:

"that Western Electric Co. shall pay to counsel for the plaintiff, on a quarterly basis, attorney's fees and disbursements incurred during Stage II of this action, less the sums incurred by Western Electric Co. in obtaining a surety bond;"

be and is hereby stayed

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX D -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 16, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plaintiff,

v.

WESTERN ELECTRIC CO., et al.

Defendants.

Civil Action No. 475-73

It is on this 16 day of July, 1979,

ORDERED that Lawrence S. Horn, Esquire, of the firm of Zuckerman, Aronson & Horn, 60 Park Place, Newark, New Jersey 07102 be, and he hereby is, appointed as a Special Master in the above-captioned case; and it is further

ORDERED that Mr. Horn be compensated by the defendant for his services as Special Master at the rate of $100 per hour.

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 17, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYRIAKI CLEO KYRIAZI,

Plainitff,

vs.

WESTERN ELECTRIC CO., et al.,

Defendants.

Civil Action No. 475-73

In light of the Supreme Court's opinion in *Great American Federal Savings & Loan Association v. Novotny,* 47 U.S.L.W. 4861 (6/11/79),

It is on this 17 day of July, 1979,

ORDERED that this Court's opinion of October 30, 1978 be, and it hereby is, vacated insofar as it holds that defendants are liable under Title 42 United States Code, §1985(3).

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

APPENDIX E — ALL WRITS ACT

28 U.S.C. §1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

APPENDIX E — CIVIL RIGHTS ACT OF 1964

42 U.S.C. §2000e-2(a)(1):

"**Employers.** It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

42 U.S.C. §2000e-5(g):

"**Injunctions; affirmative action; equitable relief.** If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the

admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)."

42 U.S.C. §2000e-5(k):

"**Attorney's fee.** In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."